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KERRI LYNN STONE*

INTRODUCTION

In his autobiography, Bill Veeck, the former owner of the St. Louis Browns baseball team, wryly recounts the moment he became "Bill Veeck, the guy who sent a midget up to bat."[1] In spite of Veeck's insensitivity, manifest in this characterization, as well as the wholly exploitative nature of the infamous stunt that he pulled, his story sets forth compelling questions about the politics of inclusion in disability law.

In his book, Veeck recalled the day in 1951 that he introduced the world to 3'7", sixty-five pound Eddie Gaedel, who was, according to Veeck, "by golly, the best darn midget who ever played big-league ball. He was also the only one."[2] As Veeck relays the story,

> Eddie came to us in a moment of desperation. Not his desperation, ours. After a month or so in St. Louis, we were looking around desperately for a way to draw a few people into the ball park, it being perfectly clear by that time that the ball club wasn't going to do it unaided.
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> . . . .
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> What can I do, I asked myself, that is so spectacular that no one will

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1. BILL VEECK WITH ED LINN, VEECK, AS IN WRECK: THE AUTOBIOGRAPHY OF BILL VEECK 23 (Univ. of Chi. Press 2001) (1962).

2. *Id.* at 11.

> be able to say he had seen it before? The answer was perfectly obvious. I would send a midget up to bat.[3]

Gaedel, Veeck recounts, became a willing participant in the stunt, and with a one-and-one-half inch strike zone, was the perfect batter to thwart even the most skilled pitcher.[4] Veeck made sure that all of the perfunctory steps required to retain Gaedel were taken: he was hired for one day, signed to a standard contract with a stipulated annual salary, and placed on the team's roster.[5] Thus, in an era that preceded the Rehabilitation Act[6] and the Americans with Disabilities Act ("ADA"),[7] the stage had been set. What, indeed, should happen when the inclusion of one whose participation in an institution like baseball has never been contemplated threatens to frustrate the rules, the implicit promises, and the sport itself? Are the institution's rules, or is the institution itself, so sacrosanct as to be immutable and thus merit the exclusion of one deemed to be too physically aberrant to participate? Or, rather, do the politics of inclusion and nondiscrimination forbid such a seemingly arbitrary exclusion of an entire class of individuals that arguably has within it many fine athletes?

Veeck's description of what occurred upon Gaedel's first at-bat recalls the precise moment that his opponents, fans, and sponsors first fully comprehended the loophole in the sport of baseball that Veeck had plotted to exploit:

> "For the Browns," said Bernie Ebert over the loudspeaker system, "number one-eighth, Eddie Gaedel, batting for Saucier."
>
> Suddenly, the whole park came alive. Suddenly, my honored guests sat upright in their seats. Suddenly, the sun was shining. Eddie Hurley, the umpire behind the plate, took one look at Gaedel and started toward our bench. "Hey," he shouted out to Taylor, "what's going on here?"
>
> Zack came out with a sheaf of papers. He showed Hurley Gaedel's contract. He showed him the telegram to headquarters, duly promulgated with a time stamp. He even showed him a copy of our active list to prove that we did have room to add another player.

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3. *Id.* at 11, 12.

4. *Id.* at 13.

5. *Id.* at 14.

6. 29 U.S.C. §§ 701–796 (2000). Recognizing the need for protection of citizens with disabilities, Congress passed the Rehabilitation Act of 1973, which prohibits discrimination against disabled individuals by a federal entity or any entity receiving federal funds. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195 (2002). "The ADA was an effort to expand the scope of the Rehabilitation Act's coverage beyond the federal government and to provide protection for people with disabilities throughout society." Vande Zande v. Dep't of Admin., 851 F. Supp. 353, 359 (W.D. Wis. 1994), *aff'd*, 44 F.3d 538 (7th Cir. 1995). Courts have recognized that "there are no relevant differences between . . . the ADA and . . . the Rehabilitation Act" and that a "separate analysis [of the two acts individually] is unnecessary." Jones v. City of Monroe, 341 F.3d 474, 477 n.3 (6th Cir. 2003).

7. 42 U.S.C. §§ 12101–12213 (2000).

> . . . The place went wild.[8]

"Fortunately," Veeck recounts, the opposing team's pitcher

> started out by really trying to pitch to [Gaedel]. The first two deliveries came whizzing past Eddie's head before he had time to swing. By the third pitch, Cain [the pitcher] was laughing so hard that he could barely throw. Ball three and ball four came floating up about three feet over Eddie's head.[9]

After the game, Veeck says,

> [n]othing remained but to wait for the expected blasts from league headquarters and, more particularly, from the deacons of the press, those old-timers who look upon baseball not as a game or a business but as a solemn ritual, almost a holy calling.
>
> . . . .
>
> . . . I was counting on the deacons to turn Gaedel into a full week's story by attacking me for spitting on their Cathedral. They didn't let me down . . . .[10]

Veeck believed that by sending an individual to bat with so small a strike zone as to thwart the most skilled pitchers he was "spitting" on the "cathedral" of baseball, but was this, in fact, the case? With nothing to prevent him from acting as he did, why was he not seen as a shrewd sportsman? Was he really breaking the letter—or the spirit—of any rule or law; or was it Gaedel's subsequent banning from the sport of baseball[11] that history has proven to be illicit?

With the passage of the ADA and litigation that continually necessitates new interpretations of its mandates, questions of the proper societal response when an entity's rules and functioning are subverted by the inclusion of one who is differently-abled or differently-built have become increasingly compelling. Because the ADA requires that reasonable accommodations be made for the disabled, so as to afford them entrée into various societal arenas: employment, places of public accommodation, etc.,[12] delineating that which is reasonable from that which is not becomes paramount. Under the ADA, however, defendant employers or entities are not required to afford an accommodation that confers an undue hardship upon them[13] or fundamentally alters that which they provide.[14] But where is that line to be drawn? Once an entity

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8. VEECK WITH LINN, *supra* note 1, at 18.

9. *Id.* at 18–19.

10. *Id.* at 19–20.

11. Indeed, the day after Gaedel's dubious debut, he was officially barred from baseball and a new rule was passed immediately, requiring all player contracts be filed with and approved by the president. *Id.* at 21.

12. 42 U.S.C. § 12101(a)(3).

13. *Id.* § 12112(b)(5)(A).

14. *Id.* § 12182(b)(2)(A)(ii).

has set about defining itself and it subsequently determines that a requested accommodation, rule waiver, or policy modification is neither tenable nor required by law, how is a court to go about questioning or second-guessing this decision?

Upon receiving backlash for sending Gaedel to bat, Bill Veeck recounts that he reacted by championing Gaedel's right to play the sport of baseball:

> "I'm puzzled, baffled and grieved by Mr. Harridge's ruling," I announced. "Why, we're paying a lot of guys on the Browns' roster good money to get on base and even though they don't do it, nobody sympathizes with us. But when this little guy goes up to the plate and draws a walk on his only time at bat, they call it 'conduct detrimental to baseball.'"
>
> If baseball wanted to discriminate against the little people, I said, why didn't we have the courage to be honest about it, write a minimum height into the rules and submit ourselves to the terrible wrath of right-thinking Americans. "I think," I said, "that further clarification is called for. Should the height of a player be 3 feet 6 inches, 4 feet 6 inches, 6 feet 6 inches, or 9 feet 6 inches?" Now that [little people] had been so arbitrarily barred, I asked, were we to assume that giants were also barred? I made dark references to the stature of Phil Rizzuto, who is not much over five feet tall, and I implied very strongly that I was going to demand an official ruling on whether he was a short ballplayer or a tall [little person].[15]

"In the end," though, Veeck recalls, "I had to agree, reluctantly, to bow to superior authority. 'As much as it grieves me,' I said, 'I will have to go along with this odd ruling.' I thought that was rather big of me, especially since I had only hired Gaedel for one day."[16]

Bill Veeck's stunt, however remote in time and however much laughed off as just that, a stunt, poses relevant questions that persist today. How far will we ask society to bend in the name of accommodating the disabled,[17] and when will we preserve the so-called sanctity of a pre-existing structure by excluding some from participation to avoid irrevocably transforming it? In the five years following the critical Supreme Court decision of *PGA Tour, Inc. v. Martin*,[18] which took up the issue of when a fundamental alteration is deemed to have occurred, federal court opinions on the subject have evinced a profound

15. VEECK WITH LINN, *supra* note 1, at 21.

16. *Id.* at 22.

17. Whether or not Gaedel would actually be considered disabled under the ADA today would boil down to the question of whether he could demonstrate that he was "substantially limit[ed] [in] one or more of [his] major life activities." 42 U.S.C. § 12102(2)(A). Nonetheless, the story surrounding his day playing for the St. Louis Browns and baseball's reaction to him raises the same questions conjured up when disabled plaintiffs seek accommodation under the ADA and defendant entities refuse to comply because, they claim, the essence of what they are or do would be compromised.

18. 532 U.S. 661 (2001).

confusion as to how to go about defining and resolving the relevant query. Indeed, these courts have wrestled with the seemingly intractable problem of figuring out when and how to define an entity's offerings and operation *for* that entity and locating the point at which it is deemed to be impermissibly transformed.

This Article surveys federal opinions that undertook the fundamental alteration query posed by Titles II and III of the ADA in the five years since *Martin*'s issuance, and identifies problems engendered by *Martin*'s approach and lack of clear guidance on the issue. It then sets forth a proposed framework and suggested considerations for courts undertaking the fundamental alteration query. The ADA does not seek to make "modifications to the legitimate areas of specialization of service providers,"[19] and thus it becomes imperative that these "legitimate areas" or the "essence" of an entity be identified at the outset of the query. Only then may a court distinguish between compelling a defendant to afford meaningful access to a disabled plaintiff and asking a defendant to venture outside the purview of that which it does or that which it is, a request that would surely amount to a fundamental alteration.

The critical question of where access ends and substance begins is akin to the query posed in antitrust law as to when an action crosses over from pro-competitive to anti-competitive—a query in which courts' deference to parties' characterizations and arguments underlies and contours the scope of the relevant "industry analysis." Using antitrust analysis as a model, this Article posits a framework for the fundamental alteration query in which the level of deference a court will give a defendant to define itself and to determine when its usual offerings are impermissibly exceeded, as well as the scope of the remedy at issue, will determine the scope of the analysis. It then sets forth some unifying considerations for courts to examine in this analysis.

This framework posits that courts' analyses should, for the most part, evince a transparency that will allow for a more cogent dialogue among courts as to what the law will and will not require.

I. LEGAL FRAMEWORK: THE ADA AND THE "FUNDAMENTAL ALTERATION" DEFENSE AS EXAMINED IN *MARTIN*

A. THE ADA

The ADA was enacted by Congress in 1990 in order to meet what Congress termed a "compelling need" for a "clear and comprehensive

19. 28 C.F.R. pt. 36 app. B § 36.302 (2006). Federal regulations state that for a court "[t]o require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice and, therefore, not be required." *Id.*

national mandate" to prevent discrimination against the disabled.[20] In furtherance of this end, the ADA prohibits discrimination against the disabled "in major areas of public life"[21] including employment (Title I),[22] public services (Title II),[23] and public accommodations (Title III).[24] This Article focuses on the resolution of fundamental alteration queries in certain claims brought under Titles II and III.

Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[25]

The implementing regulations for Title II state that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[26]

Title III of the ADA prohibits discrimination in public accommodations and sets forth a "general rule" that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[27]

Title III defines discrimination to include, among other things:

> [A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.[28]

Under the ADA, the Attorney General is entrusted with the task of promulgating Title III's implementing regulations.[29] The Department of Justice has thus issued regulations mandating that public accommodations "make reasonable modifications in policies, practices,

20. H.R. REP. No. 101-485, pt. 2, at 50 (1990).
21. *Martin*, 532 U.S. at 675.
22. 42 U.S.C. §§ 12111–12117.
23. *Id.* §§ 12131–12165.
24. *Id.* §§ 12181–12189.
25. *Id.* § 12132.
26. 28 C.F.R. § 35.130(b)(7) (2006).
27. 42 U.S.C. § 12182(a) (2000).
28. *Id.* § 12182(b)(2)(A)(ii).
29. *Id.* § 12186(b).

or procedures, when the modifications are necessary to afford goods, services, ... or accommodations" to the disabled, unless a public accommodation can show that such a modification would effect a fundamental alteration of that which it offers or is.[30] The Department of Justice has defined a "fundamental alteration" as a "modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered."[31]

The essential question undergirding the whole of the ADA is that of substance versus access.[32] When has the appropriate entrée or access been afforded, and at what point has an out-and-out substantive advantage been conferred upon an individual or a class? When has the playing field been made level, and when has it been tilted? The fundamental alteration defense is a way of ensuring that defendant entities are not compelled to completely transform themselves in order to become accessible. The question of how a fundamental alteration determination is made is thus reflective of society's approach to accommodation and inclusion generally. Indeed, courts, in distinguishing that which must be afforded from that which will effect an impermissible fundamental alteration are actually drawing a line separating the meaningful access that public accommodations must offer from actual substance whose provision will impermissibly transform a defendant.

B. *PGA TOUR V. MARTIN*: THE SUPREME COURT ADDRESSES THE FUNDAMENTAL ALTERATION QUERY

The question of what types of waivers, accommodations, or policy modifications might be seen to fundamentally alter "the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered" when the defendant entity makes such an assertion has loomed large since Congress set forth these strictures. How should a court undertake to define the "essential nature" of that which a defendant entity offers, or that which a defendant entity actually is? When the Supreme Court agreed to hear *Martin*, which was argued in

30. 28 C.F.R. § 36.302(a).

31. U.S. DEP'T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL § III-4.3600, http://www.usdoj.gov/crt/ada/taman3.html (last visited May 18, 2007).

32. Some courts have maintained that a clear delineation exists between access and substance, and that each time a substantive rule is waived or altered, the integrity of competition sustains an impermissible incursion. The relationship between the "reasonableness" of a proposed accommodation and whether it will effect a fundamental alteration is not well defined, although it is clear that reasonableness must be demonstrated by the plaintiff and a fundamental alteration must be shown by the defendant. *See, e.g*, Bingham v. Or. Sch. Activities Ass'n, 24 F. Supp. 2d 1110, 1116–17 (D. Or. 1998). Although the presence of both terms in the statute is evidence of the fact that an accommodation can, in theory, be reasonable and still effect a fundamental alteration, several courts have found that "[u]nder each provision, a modification is unreasonable if it . . . requires a 'fundamental alteration' in the nature of the privilege or program." Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000, at *14 (N.D. Ill. Nov. 21, 1996).

January 2001, it had only once before addressed the issue of what constitutes a fundamental alteration under the ADA, and it had never addressed the issue against the backdrop of Title III.[33]

Martin, whom the Supreme Court referred to as a "talented golfer,"[34] was afflicted with Klippel-Trenaunay-Weber Syndrome, a progressive degenerative circulatory disorder that rendered him incapable of walking an eighteen-hole golf course to compete in the PGA Tournament.[35] In the past, the governing bodies of the competitions that Martin entered, like the NCAA and the Pac-10 Conference, had afforded him a waiver of their requirement that players walk the golf course when playing and that they carry their own clubs.[36] Even the PGA's own rules permitted Martin to use a golf cart in lieu of walking and carrying his golf clubs during the first two stages of its competition.[37] However, once he qualified for the third and final stage of the 1997 qualifying school, Martin was denied the permission that he sought from the PGA to use a golf cart.[38]

After Martin procured a preliminary injunction from the district court, he used a golf cart in the final stage of the qualifying school, and he played well enough to earn a place on the 1998 Nike Tour.[39] At the conclusion of a six-day bench trial, the District Court found that the PGA's affording Martin a waiver of its walking rule was a reasonable accommodation that did not fundamentally alter the nature of PGA golf tournaments, and it entered a permanent injunction requiring the PGA to allow Martin to use a golf cart in PGA and Nike Tour competitions in which he became eligible to participate, as well as in any qualifying rounds for those tours.[40]

On appeal, the Ninth Circuit identified the central[41] issue in

33. As will be discussed, the Court had already addressed the issue of what constituted a fundamental alteration under the Rehabilitation Act. *See, e.g*, Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979). In Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 595–96 (1999), the Court, applying Title II, examined the issue of whether compelling a state to provide community based placement and treatment of mentally disabled individuals, rather than institutionalizing them, would fundamentally alter the service that the state provides in light of the state's limited budget with which to address such matters. The Court held that while "[u]njustified isolation ... is properly regarded as discrimination based on disability," the Court of Appeals' remand of the case "with instructions to measure the cost of caring for [individuals] in a community-based facility against the State's mental health budget" was "unduly restrictive" in light of "the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand." *Id.* at 597.

34. Martin v. PGA Tour, Inc., 532 U.S. 661, 667 (2001).

35. *Id.* at 668.

36. *Id.*

37. *See id.* at 669.

38. Martin v. PGA Tour, Inc., 204 F.3d 994, 996 (9th Cir. 2000).

39. *Id.*

40. *Id.* at 996–97.

41. A threshold issue in this case was the applicability of Title III of the ADA to the PGA Tour

adjudicating the merits of the case as whether permitting Martin to use a golf cart in the upper levels of the PGA's competition would "fundamentally alter" the nature of the PGA Tour or the NIKE Tour.[42] The Ninth Circuit concluded that the District Court had correctly found there to be no fundamental alteration foreclosing the accommodation because "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability."[43]

At the time that the Supreme Court granted the PGA Tour's petition for certiorari, it was clear to the legal community that some significant issues raised by the nature of the fundamental alteration defense would have to be explored and resolved for the first time.[44] The Court received an amicus brief in support of Martin from the sponsors of the ADA which noted that "[t]he Congressional committee reports give very few examples of the application of the fundamental alteration limitation. Each of the examples involves a relatively extreme situation that clearly would change the nature or seriously damage the enterprise involved."[45]

The Supreme Court began its analysis of the waiver of the so-called "walking rule" by recalling that to be viable, a proposed accommodation would have to be reasonable, and necessary, and not effect a fundamental alteration of "the nature of such goods, services, facilities, privileges, advantages, or accommodations" at issue.[46] The Court noted that because the PGA Tour did not dispute the assertion that Martin's use of a golf cart was a reasonable accommodation that would be necessary if Martin were to compete, its analysis should center on the PGA Tour's interposition of the affirmative defense that a waiver would amount to a fundamental alteration of the competition.[47] The Court outlined two ways in which modifying the golf tournaments at issue could

due to its questionable status as a "public accommodation." *See Martin*, 532 U.S. at 672–73. While this issue is not addressed in this Article, it was decided in favor of Martin by the Ninth Circuit, and on appeal, the Court found that even "[i]f Title III's protected class were limited to 'clients or customers,' it would be entirely appropriate to classify the golfers who pay . . . for the chance to compete . . . as petitioner's clients or customers," and that "as a public accommodation during its tours and qualifying rounds, petitioner may not discriminate against either spectators or competitors on the basis of disability." *Id.* at 679–81.

42. *Martin*, 204 F.3d at 1001.

43. *Id.* at 1000.

44. *See, e.g.*, Christopher M. Parent, Note, *Martin v. PGA Tour: A Misapplication of the Americans with Disabilities Act*, 26 J. LEGIS. 123, 145 (2000) (noting that the "impact the *Martin* decision will have on the judicial landscape is still largely unclear").

45. Brief Amici Curiae of the Honorable Robert J. Dole et al. in Support of Respondent at 25, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (No. 00-24), 2000 WL 1846087.

46. *Martin*, 532 U.S. at 682.

47. *Id.* at 683 n.38.

amount to a "fundamental alteration,"[48] but stopped short of identifying precisely *what* would be fundamentally altered. As discussed below, however, the Court seemed to dart almost unwittingly among various definitions of that which could not be fundamentally altered, shifting its perspective throughout the opinion and never truly committing to one construction.

As the Court recited, a fundamental alteration "might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally."[49] In its second iteration, the Court acknowledged, a fundamental alteration could be "a less significant change that has only a peripheral impact on the game itself," but which "might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others."[50] The proposed modification at issue—the waiver of the walking rule—according to the Court, did not constitute a fundamental alteration when viewed through the lens of either iteration.[51]

What, precisely, was in danger of being impermissibly transformed, or fundamentally altered, as the Court saw it? The "game of golf" as it existed in its purest form? In its most popular form? In its most modern form? As the PGA intended that it be played? As golf "professionals" would play it? As it had previously been played in the Tour at issue? Maybe it was the Tour itself, as an event that could not be fundamentally altered. Maybe it was the integrity of the competition that was properly placed at issue. Although *Martin*'s analysis appeared to be comprehensive, it remained unclear until its end which of these, or what at all, it is that should have been analyzed.

1. *Use of Carts Not Inconsistent with the Fundamental Character of the Game of Golf*

The Court could have framed the issue as whether or not the modification effected a fundamental change of golf as the PGA Tour intended it to be played, or of the tournament itself, as experienced by a player or by the public, or of the integrity of the competition being overseen. However, it chose initially to "observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf."[52]

Specifically, and significantly, the Court undertook to identify and contour the "essence of the game," by noting that "[f]rom early on, the

48. *See id.* at 682–83.

49. *Id.* at 682. As an example of such a fundamental alteration, the Court conceded that "changing the diameter of the hole from three to six inches *might*" amount to one. *Id.* (emphasis added).

50. *See id.* at 682–83.

51. *Id.* at 683.

52. *Id.*

essence of the game has been shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible."[53]

Moreover, the Court took note of the "essence" of the game as it was reflected by its so-called "customary" play in a variety of contexts, looking for guidance to the "Rules of Golf," authored by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland.[54] These Rules of Golf, the Court noted, "apply to the game as it is played, not only by millions of amateurs ... throughout the United States and worldwide, but also by the professionals in the tournaments conducted by [the PGA], the USGA, the Ladies' Professional Golf Association, and the Senior Women's Golf Association," and these Rules of Golf "do not prohibit the use of golf carts at any time."[55] Indeed, the Court noted, the PGA itself permitted the use of golf carts in "the SENIOR PGA TOUR, the open qualifying events for ... tournaments, the first two stages of the Q-School" and "during certain tournament rounds in both the PGA TOUR and the NIKE TOUR."[56]

The very first of the Rules of Golf, the Court observed, renders it clear that shotmaking is the "essential aspect of the game," whereas the fact that "[t]he walking rule ... [is] based on an optional condition buried in an appendix to the Rules of Golf" makes it equally clear that this rule "is not an essential attribute of the game itself."[57] Ultimately, the Court determined, "the walking rule is at best peripheral to the nature of petitioner's athletic events."[58]

Finally, the Court noted that over the course of golf's history, various evolutions in the way in which the game has been played, the equipment that has been used, the methods of transporting equipment, and the design of the course have evinced that certain aspects of the game have changed without an impermissible incursion into the core of golf's "fundamental character."[59] "Golf carts," the Court noted, "'started appearing with increasing regularity on American golf courses in the 1950s. Today they are everywhere. And they are encouraged.'"[60] Thus,

53. *Id.*

54. *Id.* at 666, 683–84 n.39.

55. *Id.* at 666. Indeed, as the Court recited, it is rather the "Conditions of Competition and Local Rules," or the "hard card," that applies to the PGA's professional tours and requires players to walk the golf course during tournaments. *Id.* at 666–67.

56. *Id.* at 685–86.

57. *Id.* at 683–85. This First Rule states that "[t]he Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the rules." *Id.* at 684.

58. *Id.* at 689.

59. *Id.* at 684.

60. *Id.* at 685 (quoting Olinger v. U.S. Golf Ass'n, 205 F.3d 1001, 1003 (7th Cir. 2000)).

having surveyed the landscapes of history, tradition, and custom, the Court found nothing about the waiver of the walking rule and the use of carts that constituted a fundamental alteration of the "character of the game of golf."[61]

2. "Highest Level of Competition" and "Outcome-Affecting" Rule Arguments Rejected by the Court

The Court then addressed the PGA Tour's contention that the proposed waiver of the walking rule would entail a fundamental alteration of the game as it was to be played in the tournaments at issue—"golf at the 'highest level.'"[62] Thus, the PGA Tour argued, because "[t]he goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules," waiving an "outcome-affecting" rule for a competitor would inherently subvert the integrity of the competition and "fundamentally alter the nature of the highest athletic event."[63] Again, however, the Court recited the test with a different object: the fundamental nature of the event, rather than the "fundamental character of the game of golf," was now that which could not be altered and the focus of the Court's query.[64]

The PGA Tour proclaimed that its purpose in implementing the walking rule was "to inject the element of fatigue into the skill of shot-making," and thus conferring the substantive advantage of not having to be subject to the rule upon even one contestant would fundamentally alter the nature of its tournaments.[65] The Court summarily rejected the PGA Tour's arguments as to both the "highest level" nature of the competition that it administered and its purpose in employing the walking rule.[66] The Court declared that "golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome."[67]

In support of this rationale for disclaiming the outcome-affecting nature of a rule designed to inflict fatigue on competitors, the Court raised the point that variables such as the weather randomize the game and extract much of the element of skill from it, making it such that "[a]

61. *Id.* at 683.

62. *Id.* at 686.

63. *Id.* (quoting Brief for Petitioner at 13, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (No. 00-24), 2000 WL 1706732).

64. *Martin*, 532 U.S. at 683.

65. Brief for Petitioner at 38, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (No. 00-24), 2000 WL 1706732.

66. *Martin*, 532 U.S. at 686–87.

67. *Id.*

lucky bounce may save a shot or two."[68] Thus, the Court reasoned, because "it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the [game's] outcome," "pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule."[69]

Moreover, the Court placed great emphasis on the District Court's finding that "the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant," as well as the fact that even when offered the option to use a cart at one of the earlier stages of competition, most PGA tournament athletes nevertheless opt to walk.[70]

3. Effect of Individualized Query

Finally, the Court found that even if it accepted the PGA Tour's premise that the walking rule was "outcome-affecting," it would still be compelled to reach the conclusion that the waiver did not amount to a "fundamental alteration."[71] Because, the Court reasoned, the ADA mandates that "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration," and because the District Court found that "Martin 'easily endures greater fatigue even with a cart than his able-bodied competitors do by walking' . . . [t]he purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart."[72]

However, upon commencing its individualized query into Martin's situation, the Court *again* shifted its focus, concluding that "allowing Martin to use a golf cart would not fundamentally alter the nature *of petitioner's tournaments*."[73] The Court reasoned that even if the walking rule was designed to subject contestants to fatigue, as the PGA Tour had argued, the District Court's finding that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking,"[74] rendered the purpose of the walking rule intact, and the tournament essentially unaltered if Martin were allowed to use a golf cart.[75] Martin, however, observed the Court, would be afforded the access to which he is entitled—the "chance to qualify for, and compete in, the

68. *Id.* at 687 (citing John Davis, *Magee Gets Ace on Par-4*, ARIZ. REPUBLIC, Jan. 26, 2001, at C16).

69. *Martin*, 532 U.S. at 687.

70. *Id.* at 687–88.

71. *See id.* at 688.

72. *Id.* at 688, 690 (quoting Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1252 (D. Or. 1998)).

73. *Martin*, 532 U.S. at 690 (emphasis added).

74. *Id.* (quoting *Martin*, 994 F. Supp. at 1252).

75. *See Martin*, 532 U.S. at 690.

athletic events petitioner offers to those members of the public who have the skill and desire to enter."[76]

The Court attached great weight to the rarity of a scenario in which one as disabled as Martin would have the talent to qualify for such a prestigious athletic competition, noting that "in the three years since [Martin] requested the use of a cart, no one else has sued the PGA, and only two other golfers ... have sued the USGA for a waiver of the walking rule."[77] Indeed, found the Court, although the ADA

> imposes ... burdens ... that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may ... preclude access by qualified persons with disabilities ... surely in a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes ... but also ... weigh the purpose, as well as the letter of the rule before determining that no accommodation would be tolerable.[78]

Martin was thus problematic to those courts seeking to apply it as precedent in fundamental alteration queries. For one thing, the constantly shifting focus as to what it was that could not be fundamentally altered evinces confusion on the Court's part as to how to properly frame the issue. Further, the Court contemplated a very wide range of evidence and considerations, which ranged from the way in which golf has been played at other times and other places to the myriad of ways in which a "lucky shot" may be hit and enable one player to prevail over a less talented player. Nowhere did the Court explain how it derived the parameters of that which it looked to in reaching its conclusion or the latitude to speculate about things like the role of luck versus skill in golf. Moreover, although the remedy at issue in *Martin* was a one-time waiver being granted to a specific individual, the Court did not touch upon how future opinions might go about performing a fundamental alteration analysis where the remedy at issue was sweeping, prospective policy change.

II. IN *MARTIN*'S WAKE: STATE OF THE LAW AND *MARTIN*'S PROGENY

A. THE WAKE OF *MARTIN*: CURRENT STATE OF THE ANALYSIS

It has now been over five years since *Martin*'s issuance. In order to survey, understand, and evaluate its progeny and the current state of the fundamental alteration analysis, however, it is important to begin with those rudiments, left in *Martin*'s wake, with which subsequent courts had to work. Essentially, based on *Martin*, courts found themselves in a

76. *Id.*
77. *Id.* at 690 n.53.
78. *Id.* at 690–91.

situation in which: (1) they could not accord wholesale deference to any defendant unless directed to do so by statute; and (2) they were left with only the most basic definitions of what amounted to a fundamental alteration, but no binding guidelines as to how to approach the query.

1. Wholesale Deference to Defendants' Self-Serving Claims and Characterizations of "Essence" and "Fundamental Alteration" Is Not a Workable Solution

In its brief to the Supreme Court, the PGA premised its fundamental alteration argument on its assertion that "any waiver of a substantive rule for a given competitor is out of keeping with the fundamental premise of professional sports,"[79] but this too may miss the mark, because it begs the question of what amounts to a "substantive rule."[80]

The Supreme Court, for its part, contemplated what it believed to be a request by the PGA Tour for absolute deference in *Martin*, calling the PGA Tour's "claim that all the substantive rules for its 'highest-level' competitions are sacrosanct and cannot be modified" tantamount to "a contention that it is exempt from Title III's reasonable modification requirement."[81] Rejecting this argument, the Court noted that the provision at issue "carves out no exemption for elite athletics,"[82] as it does for "private clubs or establishments" and "religious organizations or entities," and that protestations to an athletic competition's being subject to judicial scrutiny as to the reasonable modification requirement was "a complaint more properly directed to Congress."[83] In fact, the Court found, according wholesale deference to sports organizations and allowing them to "exempt themselves from the fundamental alteration inquiry by deeming any rule, no matter how peripheral to the competition, to be essential," would render the word "'fundamentally' largely superfluous," because such an apprcach "treats the alteration of any rule governing an event at a public accommodation to be a fundamental alteration."[84]

This reasoning makes sense on one level; an absolute insulation of sports or other organizations charged with administering a fair competition could permit those who would engage in impermissible

79. Brief for the Petitioner, *supra* note 65, at 34.

80. The PGA did go on to acknowledge that "[i]t remains entirely appropriate for a court to question whether a particular rule may, in fact, have a possible (non-trivial) effect on the outcome of the athletic competition." *Id.* at 34–35.

81. *Martin*, 532 U.S. at 689.

82. *Id.*

83. *Id.* at 689 n.51.

84. *Id.*; *see also* Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL'Y REV. 99, 108 (2004) (observing that *Martin* "rejects the idea that competitive sports are exempt from the ADA because they are 'different' from other covered pursuits").

discrimination on the basis of disability to evade any review of their actions and decisions whatsoever, and to thereby evade accountability clearly conferred upon them by the ADA.[85] Nonetheless, allowing a court to simply roll up its sleeves and undertake a wholly unstructured analysis of what *it* deemed to be an organization's essential goals or functioning, unaided by any guideposts or strictures, could create results that are dissonant and divergent, if not chaotic.

Thus, a proposed test that would "consider[] the individual aspects of the public accommodation," examining, for example, "individual aspects of PGA Tour's events,"[86] without certain unifying considerations and strictures, runs the risk of itself being too amorphous. Such a test might either allow the entity being sued to wholly insulate itself from judicial review by defining itself to systemically and unnecessarily exclude the disabled;[87] or allow courts to retain too much discretion in defining and choosing the many and various vaguely-defined "aspects" of a public accommodation.[88]

Rather, the best way to approach crafting uniform considerations for courts to apply in "fundamental alterations" analyses would be to start with the law as it was laid out in *Martin*.

2. *The Mandates and Impact of* MARTIN

Because the Court in *Martin* limited its analysis so strictly to the facts before it,[89] its precedential value lies in the rule that it set forth with respect to the fundamental alteration query. Under *Martin*, then, a court undertaking to ascertain the essence of an entity for the purposes of a

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85. *See* Martha Lee Walters & Suzanne Bradley Chanti, *When the Only Way to Equal Is to Acknowledge Difference:* PGA Tour, Inc. v. Martin, 40 BRANDEIS L.J. 727, 747–48 (2002). This article, authored by Martin's attorney, points out that "[a] trial court cannot simply defer to the definition put forth by the defendant because it is too easy for the defendant to simply re-characterize itself as existing for the purpose of carrying out the rule or policy that the plaintiff seeks to alter." *Id.* at 747. Moreover, the article notes that:

> For those who would argue that a court must defer to a sports organization and permit it to define its fundamental nature as its rules, it is illuminating to ask whether they would limit this deferral to rules of competition or would also include rules of eligibility. Certainly Justice Scalia would not permit a sports organization to declare that the game it wanted to play was the Caucasian Golf Game . . . . A complete exemption from the Civil Rights Act and the ADA would be necessary to engage in such obviously intentional discrimination.

Id. at 748.

86. James B. York, Note, *And the Winner Is . . . Trial Lawyers: When Does an Accommodation Under Title III of the ADA Represent a Fundamental Alteration of Competitive Sports?*, 67 MO. L. REV. 685, 702 (2002).

87. *See id.* at 703 (advancing a test where the "focus is on the game as played by the particular organization"). One could imagine a scenario in which an organization determines that a game must be played a certain way, but this methodology simply does not bear upon the substantive rules or goals of the competition, but rather exists only to exclude disabled competitors and avoid the costs or inconveniences associated with accommodating them.

88. *See id.* (proposing that "any test used must take into account each individual aspect of the public accommodation").

89. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 682, 690 (2001).

"fundamental alteration" analysis under the ADA against the backdrop of a competition must determine whether the proposed modification either (1) could unacceptably alter an essential aspect of "x"; or (2) could confer upon a disabled contestant, "in addition to access to the competition as required by Title III, an advantage over others."[90] This analysis must be done in the course of conducting an individualized inquiry into each request for a modification or accommodation received and with a careful eye toward the purpose of the rule or policy being challenged.[91] This test has been recognized by commentators as "a clear departure" from the analytical framework employed by courts dealing with Title III against the factual backdrop of competitive sports,[92] but it remains binding.

While *Martin* was pending before the Supreme Court, many anticipated that a decision in the plaintiff's favor would open the proverbial floodgates to litigation brought by disabled plaintiffs to gain access to athletic competitions and confer upon courts the ability to craft the rules of athletic competition.[93] Even courts adjudicating disability cases immediately prior to *Martin*'s issuance anticipated that "the reasoning employed in the [district and court of appeals] *Martin* opinions provides guidance to courts evaluating the ADA's application to athletic events."[94] In the wake of Martin's issuance, however, commentators took note of the fact that no such "floodgates" phenomenon had occurred, and courts everywhere were not rewriting the rules of various sports.[95] Indeed, when Martin entered his first tournament after the opinion was issued, the Greater Cleveland Open in June 2001, he did not even make the so-called "cut," permitting him to progress in the competition.[96] Most salient, only a handful of federal appellate and district court cases have performed a fundamental alteration analysis and invoked *Martin* in the five years since its issuance.[97]

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90. *See id.* at 683.

91. *See id.* at 690–91.

92. York, *supra* note 86, at 701.

93. *See, e.g.*, Phillipe Langlois, Casenote, *Casey Martin Tees Off with the Help of the Americans with Disabilities Act:* Casey Martin v. PGA Tour, Inc., 3 LOY. J. PUB. INT. L. 220, 234 (2002).

94. Matthews v. NCAA, 179 F. Supp. 2d 1209, 1220 (E.D. Wash. 2001).

95. *See* Langlois, *supra* note 93, at 234–35; *see also* Melissa Ann Resslar, Note, PGA Tour, Inc. v. Martin*: A Hole in One for Casey Martin and the ADA*, 33 LOY. U. CHI. L. J. 631, 684 (2002) (noting that "Americans have yet to see [Martin's] impact on professional sports"). It is interesting to note that scholars were still asking in 2005 whether "the floodgates [would] be opened by disabled athletes' requests to modify the rules of the game to allow them to compete on level playing fields with non-disabled athletes?" Donald H. Stone, *The Game of Pleasant Diversion: Can We Level the Playing Field for the Disabled Athlete and Maintain the National Pastime, in the Aftermath of* PGA Tour, Inc. v. Martin*: An Empirical Study of the Disabled Athlete*, 79 ST. JOHN'S L. REV. 377, 386 (2005).

96. *See* Langlois, *supra* note 93, at 235–36.

97. *Cf.* Greely, *supra* note 84, at 110 (observing that as of the end of 2003, the sports-related cases in which *Martin* was invoked "seem largely to have involved challenges to eligibility rules, not to the

B. CONFUSION IN *MARTIN*'S WAKE

Commentators examining the limited number of cases in which federal courts have performed a fundamental alteration inquiry since *Martin*" have recognized the need for meaningful guidance and standards for courts and potential defendants to employ with these issues before them.[98] At first blush, the issue of whether the "essence" of something has been "fundamentally altered" presents a seemingly esoteric query—one with so many strands of reasoning and ways of being viewed as to seem intractable.

However, at the core of the seeming arbitrariness in these decisions lie several key problems engendered by flaws in *Martin*'s guidance. These include: (1) courts' failure to properly articulate the issue of what it is that must not be fundamentally altered; (2) courts' unwillingness to explicitly set forth the deference that they will show a defendant entity in stating the "essence" at issue and locating the point at which it is fundamentally altered; (3) courts' improper contemplation of the scope of the remedy at issue when defining the universe of considerations relevant to the query; and (4) courts' varying degrees of depth and breadth of analysis when examining whether a fundamental alteration exists.

These recurring problems and trends have emerged as illustrative of courts' confusion as to the relevant analysis in the wake of *Martin*. Their persistence necessitates an analytical framework designed to clarify the issues implicated by the fundamental alteration query and to impose strictures and guidelines to aid in that analysis so that courts may begin to engage in a meaningful and cogent dialogue with one another as to when the fundamental alteration test is satisfied.

1. *Failure to Articulate the Underlying Issue of What Must Not Be*

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rules of the athletic contest"). Greely tried to explain this paucity of lawsuits challenging sports' rules by observing that:

> Because of the ethos of competition, many competitors in athletics would not want, or accept, an unfair and visible advantage. To have, or to be seen as having, special aid devalues the accomplishment—and probably does not help the athlete's standing with his or her peers. Only when the rule seems obviously unrelated to the competition on the field of play are athletes with disabilities likely to challenge it.

Id. at 111.

98. *See, e.g.*, Resslar, *supra* note 95, at 688 ("[T]he Martin decision leaves sports organizations and governing bodies with little guidance in determining whether a requested modification is reasonable, as the Court simply failed to create a standard for determining when a modification must be made."); Greely, *supra* note 84, at 100 (observing, in 2004, that the "broader implications of [the *Martin*] holding remain unclear"); York, *supra* note 86, at 701 (observing that in *Martin*, the Court "failed to provide any standard that organizers of competitive sports or, for that matter, any business owner could possibly use to determine whether a particular accommodation would represent a fundamental alteration of the sport or business," and that *Martin* set a dangerous precedent of permitting "the judicial system to make ad hoc decisions" when it comes to questions of fundamental alteration).

Fundamentally Altered.

Martin took what should have been two distinct queries: what would, *in theory*, be impermissibly fundamentally altered by the proposed accommodation, and whether a fundamental alteration of that item, event, or essence, in fact, occured; and collapsed them into one: did a "fundamental alteration" take place? The confusion engendered by the Court's failure to explicitly answer each of these questions in turn persists in post-*Martin* cases. After all, as the U.S. Government had pointed out in an Amicus Brief submitted to the Supreme Court in 1984, "antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit."[99]

Due to *Martin*'s confusion on the issue, opinions issued in *Martin*'s wake evince a fundamental confusion as to *what*, precisely, is in jeopardy of being impermissibly transformed by a proposed modification or accommodation. Perhaps no case illustrates this confusion better than *Jones v. City of Monroe*,[100] a Sixth Circuit case whose majority and dissenting opinions engaged one another in a discourse in which each accused the other of failing to properly define the case's issue at its outset.

In *Jones*, the plaintiff, who was afflicted with multiple sclerosis, brought suit under Title II[101] of the ADA after the City refused to modify its one hour parking program to afford her a free all-day parking spot adjacent to her place of employment.[102]

The majority began its analysis by defining what the City offered to the public—free short-term parking for those who wished to engage in business in the downtown business district—and its goal, noting that "[t]he short-term, one-hour nature of the benefit is designed to help downtown businesses by making parking spaces in close proximity to them more readily available."[103]

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99. Brief for the United States as Amicus Curiae Supporting Petitioners at 29 n.36, Alexander v. Choate, 469 U.S. 287 (1985) (No. 83-727), 1984 WL 565555.

100. 341 F.3d 474 (6th Cir. 2003).

101. Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2000). Section 12131 defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

102. *See Jones*, 341 F. 3d at 475. Apparently the City provided 373 long-term parking spots within two blocks of the plaintiff's, sixteen of which were designated as handicapped spaces, but it limited parking to one hour at an additional 110 free parking spaces in the retail district, and it was one of these 110 spots that the plaintiff sought. *Jones*, 341 F.3d at 482 (Cole, J., dissenting).

103. *Id.* at 478 (majority opinion).

The court noted that the plaintiff "has equal access to free downtown parking. She does not have free downtown parking accessible to any destination she selects or, unfortunately, her workplace."[104] Thus, the essence of the benefit at issue, the court said, was "free downtown parking at specific locations[,] ... not free downtown parking that is accessible to wherever a citizen, disabled or non-disabled, chooses to go or work."[105]

The dissent, on the other hand, disagreed that the plaintiff's abstract ability to park in a long-term spot signified that she had "the 'meaningful access' that the ADA requires."[106] Rather, for the plaintiff to avail herself of the parking program, she required "access to the locations which non-disabled individuals can access from these parking lots," which meant that she had "the right to the benefit of meaningful access to those locations that—but for her disability—would be accessible to her through [the] parking program."[107] The dissent made special note that it was "not conflating this benefit with free downtown parking. Rather, the majority's attempt to separate the two is artificial. Parking is only meaningful insofar as it provides individuals with access to their destinations."[108]

Perhaps, indeed, as a result of *Martin*'s constantly-shifting focus as to what its query was about, the *Jones* majority and the dissent disagreed as to: (1) the "essence" of the benefit offered by the city; (2) what amounted to equal participation in the good provided; and (3) how to properly characterize the nature of Jones's request. These disagreements all evinced the court's inability to wrap its thinking around the query before it; an inability to focus that was likely spawned by *Martin*.

The crux of the disagreement between the majority and the dissent in *Jones* lies in initially defining the essence of what the City was offering. Because the plaintiff had access to free long-term parking downtown, the majority disagreed with the dissent's statement that she had been impermissibly excluded from free downtown parking.[109] Moreover, the majority asserted, the dissent's very framing of the issue was misguided:

> While the dissent claims to define the benefit at issue as 'free downtown parking,' the dissent later identifies the benefit as the ability 'to park for free all-day in spaces that allow them meaningful access to

104. *Id.* at 479.

105. *Id.* The court went on to note that "[t]he reality of Monroe's free downtown parking system is that not every person is going to have access to his or her workplace or other destination of choice." *Id.*

106. *See id.* at 484 (Cole, J., dissenting) (citing Alexander v. Choate, 469 U.S. 287, 301 (1985) (an "otherwise qualified handicapped individual must be provided with meaningful access to the benefit offered")).

107. *Id.* at 485.

108. *Id.*

109. *See id.* at 478–79 (majority opinion).

> their destination.' *The dissent thus conflates meaningful access to downtown parking with meaningful access to an individual's destination of choice.*[110]

The majority purported to decide the case under the framework set forth by *Martin*.[111] However, to demonstrate that the proposed accommodation for Martin would not confer an undue advantage upon him, but would, rather, afford him the access to compete to which he was entitled, *Martin* invoked the fact that some golfers hit luckier shots, or benefit from randomly more favorable conditions.[112] In stark contrast, the *Jones* Court employed the fact that the benefit of free downtown parking provided by the City resulted in "locations [that] will necessarily be more accessible to some workplaces than others," to underscore its point that "equal results from the provision of the benefit ... are not guaranteed."[113]

The court determined that waiving "the ordinance limiting parking to one hour in the business district would be 'at odds'" with the rule's fundamental purpose, because "[b]y its very nature, the benefit of one-hour free public parking cannot be altered to permit disabled individuals to park all day without jeopardizing the availability of spaces to other disabled and nondisabled individuals."[114]

After identifying the City's purpose in imposing the one-hour parking limitation for the requested parking spot as "to encourage patrons to shop at downtown businesses,"[115] the court identified the "essential element of a one-hour free public parking area" as "the time limitation on an individual's ability to use a designated space to park his or her vehicle."[116] Therefore, the court concluded that "[a]lteration of the time limit on spaces designated for one-hour parking is a fundamental alteration of the parking scheme."[117] Moreover, the court added, "[s]uch a waiver would also require [the City] to cease enforcement of an otherwise valid ordinance, which by its very nature requires a fundamental alteration of the rule itself."[118]

The dissent found that the majority applied the ADA "in a manner that essentially eviscerates [its] purpose and renders [it] impotent in its ability to provide recourse for disabled individuals."[119] Specifically, the dissent rejected the majority's reasoning that "'the benefit is not

110. *Id.* (emphasis added).
111. *Id.* at 480 n.9 (distinguishing *Martin*).
112. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 687 (2001).
113. *Jones*, 341 F.3d at 479.
114. *Id.* at 480.
115. *Id.*
116. *Id.* at 480 n.9.
117. *Id.*
118. *Id.* at 480.
119. *Id.* at 481 (Cole, J. dissenting).

appropriately defined as free downtown parking generally, but rather as the provision of all-day and one-hour parking in specific locations'" because it failed to "clarify precisely how the majority is defining the benefit, which is critical to this case."[120] Thus, the dissent concluded, although the time restrictions on the parking spots are the same for the disabled and the non-disabled, "the durational limitation in and of itself is not the problem. Rather, the problem... is that the durational limitation renders Jones unable to take advantage of a benefit clearly distinct from the durational limitation, that is, free and accessible, all-day downtown parking."[121]

As to the question of fundamental alteration, the dissent noted that the majority failed to point to anything about the proposed modification that would alter the service provided, but rather had "merely point[ed] out that the requested modification is a change."[122] Change, the dissent argued, is "precisely what the governing statutes require."[123] Noting that the Supreme Court "has explicitly rejected the idea that any mere alteration of a rule is fundamental,"[124] the dissent underscored the fact that "the waiver of any rule alters that rule tautologically."[125] Thus, the dissent concluded that the central issue was "whether waiving the one-hour ordinance for Jones would fundamentally alter the overall parking scheme downtown, not its effect on the one-hour ordinance."[126]

With the dissent and majority unable to agree as to that which must not be fundamentally altered, *Jones* underscores the importance of a court beginning its analysis by setting forth any alternate or conflicting framings of the issue by the parties and articulating the iteration that it chooses, as well as its reason for doing so. When a court is too quick to conclusorily state the issue as it sees it without acknowledging conflict as to how to define it, the ensuing analysis can be rendered devoid of reasoning and thoughtfulness. A conclusory proclamation of that which is in danger of being fundamentally altered without a careful weighing of the alternate framings of the issue prevents a court from commencing its analysis at a neutral starting point. It is imperative that courts, unlike the Court in *Martin*, parse out and address the issue of what must not be

120. *Id.* at 485.

121. *Id.* at 485–86.

122. *Id.* at 486.

123. *Id.* (adding that "[i]f courts were permitted to hold, as the majority does here, that any "modification" fundamentally alters the service because it requires that the service be "modified," the Rehabilitation Act and the ADA would be rendered ineffectual").

124. *Id.* at 487 (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 n.51 (2001)). The dissent added that "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does." *Id.* (citing Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 782–83 (7th Cir. 2002)).

125. *Id.* at 488.

126. *Id.* at 487.

fundamentally altered—in other words, what is the "essence" of the enterprise—and *then* proceed to determine whether or not the alleged fundamental alteration would take place.

2. *Failure to Articulate Deference*

Despite the Supreme Court's conclusion in *Martin* that Title III, like the ADA as a whole, "regulates access to but not the content of what is provided,"[127] the question of access versus substance has stymied federal courts trying to apply *Martin* to the question of fundamental alteration. It is axiomatic that when a proposed accommodation is being examined by a court, "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the . . . benefit may have to be made."[128] But how is a court to go about meaningfully determining when a defendant has defined the relevant benefit in such a way as to systemically and unnecessarily exclude the disabled? Once a defendant has defined itself and its offerings so as to make the plaintiff's request exceed the parameters of that which it generally offers, it can easily argue that its offerings will be fundamentally altered if that request is granted because "[t]he purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided."[129]

The line between substance and access, then, is often so fine that it almost seems to shift when one alternately views the query through the eyes of the plaintiff and those of the defendant. Courts' location of this line is a subjective endeavor, and it is undertaken against the backdrop of the parties' own characterizations of what the defendant entity does and to what the plaintiff is entitled. When choosing how searching a look it will give a defendant's fundamental alteration argument or how broad the relevant universe of evidence and considerations will be in the analysis, a court must, at least implicitly, decide how much deference to accord a defendant entity in defining what it is, does, or offers. Thus, a court that accords a greater degree of deference to an entity contouring the parameters of what it is, does, or offers will more readily accept its characterization of that "nature." Courts affording various degrees of deference to various defendants and in various circumstances need to articulate this deference so that their opinions do not appear arbitrary or ad hoc.

In *Todd v. American Multi-Cinema, Inc.*, the district court granted

127. Dryer v. Flower Hosp., 383 F. Supp. 2d 934, 941 (N.D. Ohio 2005).
128. Alexander v. Choate, 469 U.S. 287, 301 (1985).
129. Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1012 (6th Cir. 1997).

summary judgment to movie theaters and operators being sued under Title III by hearing impaired patrons for their failure to, among other things, incorporate captioning in all movies and at all movie theaters.[130] The defendants argued that they should not be compelled to furnish captioning for every movie shown, because "[s]uch a mandate . . . would constitute a fundamental alteration of the goods and services they provide."[131] The court specifically took issue with the plaintiff's contention that hearing impaired patrons were denied "access" to which they were entitled, noting that the allegation was not that the disabled were denied physical access to the movies being shown, but rather that they were being denied "access" to first-run movies.[132] The court stated that "[e]qual access does not mean equal enjoyment."[133]

Although the court's conclusion was not necessarily unreasonable , it quickly and conclusorily dismissed the plaintiffs' access and enjoyment arguments. Having implicitly accorded the theaters the latitude to show first-run movies without the requested accommodation and without deeming them to have interfered with anything more than additional "enjoyment," rather than an essential participatory entitlement, the court omitted any discussion of the deference that it showed in granting summary judgment.

In *Dryer v. Flower Hospital*, the plaintiff, whose pulmonary condition required an oxygen tank to assist with breathing, sued, under Title III of the ADA, the hospital to which her husband was admitted.[134] She sued after hospital staff informed her that it was against Hospital policy to permit non-patients to use in-room oxygen ports.[135]

The district court began its analysis of the proposed modification to the hospital's policy by identifying the "nature" of Flower Hospital as being the provision of "care to patients at the Hospital, i.e., those who are admitted for the purpose of treatment and have medical personnel in the Hospital that are responsible for their well-being."[136] The court then determined that while

> [t]his care includes the administration of oxygen and other prescribed substances, . . . [r]equiring the Hospital to administer medications to individuals who are not patients of the Hospital, those whose purpose at the Hospital is not treatment but visitation, and individuals with no one at the Hospital responsible for their care, would fundamentally alter the basic rule that hospitals care for *patients*.[137]

130. No. Civ.A. H-02-1944, 2004 WL 1764686, at *1 (S.D. Tex. Aug. 5, 2004).
131. *Id.* at *2.
132. *Id.* at *4.
133. *Id.*
134. 383 F. Supp. 2d 934, 936 (N.D. Ohio 2005).
135. *See id.*
136. *See id.* at 940.
137. *Id.*

While the court arguably reached a sound result, its reference to a "basic rule" without acknowledging its deference to the defendant as to what it was obligated to provide and to whom left the opinion bereft of an essential piece of reasoning. Indeed, the notion that a hospital exists to furnish medical provisions to its patients, and not to its guests, may seem axiomatic to most. However, the mandates of the ADA—that the disabled be afforded *meaningful access* to places of public accommodation—leaves room for the interposition of the obligation to change the way entities operate and to blur the line between affording meaningful access and non-required, or even impermissible, substance.

There are certainly circumstances, like health emergencies, in which the law *might* impose upon a hospital the obligation to furnish care or medication for visitors not formally admitted. Is it unreasonable to ask a hospital to furnish such care to visitors aware of their need for services but unwilling to become patients or otherwise procure the hospital's services themselves? The court in *Dryer*, noting that the linchpin of Title III is "*access to*, but not the *content of* what is provided," determined that the plaintiff was entitled to "safe and secure access to the building, to common areas, and to her husband's room," but not to "specialized content . . . not typically provided . . . to visitors."[138] This determination is arguably reasonable, but it stems from the court's unarticulated belief that a hospital should be accorded the latitude to treat only patients, and not merely anyone there for another purpose who requires non-emergency care.

There are often cases in which overarching policy concerns will ultimately predicate a court's conclusion as to fundamental alteration, such as public safety[139] or preserving an institution's ability to set and

138. *Id.* at 941 (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–91 (2001)).

139. In *Young v. City of Claremore, Okla.*, 411 F. Supp. 2d 1295, 1298 (N.D. Okla. 2005), the plaintiff, who had cerebral palsy, alleged that a city ordinance barring use of golf carts on streets violated the ADA. The court, however, found that the requested modification in that case would result in a "direct threat" to others' safety because the plaintiff's golf cart was "manufactured for off-road use" and failed to conform to the federal safety standards. *Id.* at 1300, 1313. Moreover, the Court found, the cart posed a sizable risk to others "due to the significant size, weight, and speed differences between a golf cart and a motor vehicle." *Id.* at 1313. Although the Court forbore from explicitly addressing the fundamental alteration question, it did note that "[t]he same safety problems addressed in the 'direct threat' analysis would cause Defendant to be forced to make a 'fundamental alteration' in its 'program' of providing safe streets, in light of the unlimited and unrestricted nature of Plaintiff's request in this case." *Id.* at 1314 n.19.

Furthermore, in *Bauer v. Muscular Dystrophy Ass'n, Inc.*, 268 F. Supp. 2d 1281, 1289 (D. Kan. 2003), the court found that a fundamental alteration would transpire if the plaintiffs—prospective camp volunteers who had muscular dystrophy—could compel the defendant (the "MDA") to modify its requirement that volunteers at its summer camp be able to lift and care for campers. The court found that the MDA had demonstrated "that its eligibility criteria are necessary for the safe operation of the camp and are also necessary to provide the privileges and advantages of the camp to the intended beneficiaries . . . i.e., the campers and their parents," and that "[t]he assurance that MDA provides to campers and their parents that all of its Volunteer Counselors are capable of caring for

maintain academic standards.[140] These concerns, however, reflect the deference that society and the courts confer upon certain defendants. Any deference that a court plans to accord a defendant in defining itself and its parameters must be articulated, as will be discussed below, and not implicitly conferred.

3. Improper Contemplation of the Scope of the Remedy at Issue

A look at another case applying *Martin* to the fundamental alteration query underscores the need for courts to evaluate the impact of an alteration with an eye towards the nature of the remedy at issue: is an entire policy being modified prospectively; or is a single individual receiving an individually conferred benefit? The answer to this question should dictate and define the universe of relevant evidence and considerations employed by a court. *Martin* involved an individual waiver being granted to one person deemed unique,[141] but the question of whether a prospective, broad-based policy change will fundamentally alter an entity's operations should entail a universe of considerations broader than the facts underlying the lawsuit that invited the remedy.

In *Lentini v. California Center for the Arts, Escondido*, the plaintiff, a quadriplegic, sued an Arts Center under Title III after her service dog, who had been permitted to accompany her to performances, was prohibited from entering the theater after incidents of barking.[142] The Center's written policy stated that "animals are not permitted in the

campers and assisting in an emergency is an important attribute of MDA's Summer Camp." *Id.* at 1294. The court thus concluded that the nature of the services provided by the camp would be fundamentally altered if the camp were forced to modify its selection criteria for volunteers as requested because "[a] public accommodation may impose neutral rules and criteria that are necessary for the safe operation of its business." *Id.* "To require MDA to alter its criteria would amount to an undue burden that would require MDA to incur significant costs, increased risks to its campers, increased risk of liability, and an unreasonable shifting of resources away from the intended beneficiaries of the camp to the counselors who are there for the purpose of assisting campers." *Id.*

140. In *Doe* ex rel. *Doe v. Haverford Sch.*, No. 03-3989, 2003 WL 22097782, at *1 (E.D. Pa. Aug. 5, 2003), the court found that a proposed modification to a high school's academic standards made by a disabled student would fundamentally alter the nature of that which was provided by the institution. "Educational institutions," the court found, "are in the best position to know what modifications would fundamentally alter their services." *Id.* at *8. In fact, the court disclosed, "[c]ourts generally will not substitute their judgment for that of an educational institution regarding what modifications fundamentally alter these policies." *Id.*

The court noted that the defendant—"an educational institution" whose "fundamental purpose is to educate its students"—had already engaged in a substantial modification of its existing academic policies for the plaintiff, and expended a great deal of time "looking for solutions to the plaintiff's problems with completing his work." *Id.* at *8, *9. However, the court found that "[d]espite Haverford's efforts, the plaintiff has not completed much of his work from the . . . academic year." *Id.* at *9. The court reasoned that because the plaintiff's "request to complete his work and his exams during the summer completely exempt[ed him] from Haverford's attendance policy," the school's "judgment that further modifications of the type requested by the plaintiff fundamentally alters the nature of its services is rationally justifiable." *Id.*

141. *See Martin*, 532 U.S. at 682, 690–91.

142. *See* 370 F.3d 837, 840 (9th Cir. 2004).

theater, except for certified assistance animals accompanying people with disabilities," and ticket takers were instructed to admit any "recognizable" service animals.[143]

Following a bench trial, the district court found in favor of the plaintiff on her ADA claim and ordered the Center to modify its policies to give disabled individuals the "broadest feasible access" to the Center, noting specifically with reference to plaintiff's situation that:

> The Center's policies, practices and procedures may not exclude a service animal who has made a noise on a previous occasion, even if such behavior is disruptive, if the noise was made and intended to serve as means of communication for the benefit of the disabled owner or if the behavior would otherwise be acceptable to the Center if engaged by humans.[144]

The defendants maintained on appeal that, *inter alia*, the modification would fundamentally alter the services and facilities that it provided.[145] Finding that no such fundamental alteration would take place, the Ninth Circuit premised its conclusion on an analysis of the specific events that triggered the denial of entry to the plaintiff's dog,[146] not of the effect of the ordered policy modification or of the functioning of the Arts Center generally.,[147] The court noted that "the facts of this case provide evidence contrary to [the President and Chief Operating Officer's] testimony."[149]

The court found that because the dog had made noises at two performances, neither of which generated any complaints, and that because on one of those occasions the Director of Center Sales and Event Services had not felt the need to stop the noise or mention the incident to the plaintiff after the show, the plaintiff's dog had caused no "significant disturbance."[150] This, the court reasoned, was "especially significant" because the defendants had cited the incidences of plaintiff's dog making noise as a "basis for their concerns regarding the ordered modification," and the Center's President and Chief Operating Officer testified that the Center would not exclude a "random animal," but

143. *Id.*

144. *Id.* at 842.

145. *Id.* at 843.

146. *Id.* at 846.

147. The court had an ample basis upon which it could have reached conclusions about the effect of barking dogs and their impact upon the Center's functioning. Indeed, the Center's President and Chief Operating Officer testified about the ways in which barking dogs can disturb theater patrons and lose revenue for and artists' interest in the concert hall. *See id.* at 845–46. The President testified that barking "'may offend and drive away other patrons,'" and that although "'people are increasingly accustomed to the presence of service animals in public areas of all kinds,'" a barking dog will "'pierce[ ] through the veil of [patrons'] expectations.'" *Id.* at 845.

148. *Id.* at 846.

149. *Id.*

150. *Id.*

rather worried about plaintiff's dog because the dog had already barked in the concert hall.[151] Having thus undermined what it termed the "premise" of the President's argument that the services and facility provided by the Center would be fundamentally altered by the modification, the Court deemed his conclusion "highly questionable."[152]

This rejection of the President's argument and testimony was concomitantly a rejection by the court of the defendants' legal argument regarding fundamental alteration. Inexplicably, and perhaps due to a misreading or a misguided application of *Martin*, the court chose to allow what should have been, at best, a faulty premise permitting the questioning of a witness' credibility to strike at the legal arguments and conclusions upon which the disposition of the case rested. The core issue at that point—whether or not that which the Center provided to its patrons would be fundamentally altered if the Center were forced to admit service animals who had "made a noise on a previous occasion, even if such behavior is disruptive, if the noise was made and intended to serve as means of communication for the benefit of the disabled owner or if the behavior would otherwise be acceptable to the Center if engaged by humans"[153]—was entirely sidestepped.[154]

Irrespective of the outcome, it seems absurd to conclude that this ordered modification, which has general applicability, did not amount to a fundamental alteration of the Center's provision of services simply because the facts undergirding the lawsuit that engendered the order showed that the dog's behavior in that instance was not "disruptive." Regardless of what did or did not occur in the case of the *plaintiff's* dog, the defendant in *Lentini* was told that when certain types of noises were involved, it was forbidden from employing "practices and procedures" that may "exclude a service animal who has made a noise on a previous occasion, even if such behavior is disruptive."[155]

Thus, while a truly "individualized query" is entirely appropriate for a court to make when evaluating whether a proposed modification or accommodation is essential or reasonable, the query must necessarily

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151. *Id.*

152. *Id.*

153. *Id.* at 842.

154. This Article reserves comment as to whether or not the ordered modification would, indeed, have fundamentally altered the services offered to patrons, and instead merely points to and questions what went into the court's analysis of the fundamental alteration question. The court's conclusion as to the President's testimony did not go to its underlying validity regarding the ordered modification generally, it was, rather that based on the evidence regarding plaintiff's dog:

> At best, [the] testimony provides some reasonable speculation about the effect of a barking dog at a performance. This speculation, however, is undercut by evidence that whatever noise [the dog] made in the Center, he did not cause a significant disturbance or trigger patron complaints.

Id. at 846.

155. *Id.* at 842.

expand to contemplate the wholesale effect that the change will have on the enterprise when a court reaches the argument that a sweeping policy modification will effect a fundamental alteration. At that point, because of the nature of the remedy at issue, the question before the court is no longer tethered to the facts of the underlying case, but rather centers around questions as broad as the prospective change itself.

This does not mean, however, that any defendant faced with a mandated broad-based change in its policy can simply trot out a so-called "parade of horribles"[156] by way of explaining why a policy change is untenable. In *Dudley v. Hannaford Bros. Co.*, the First Circuit considered a difficult case in which it said that the "laudable" policies underlying the ADA came into tension with the similarly "laudable" policy of the state of Maine in enacting legislation "constrain[ing] retailers against the profligate sale of alcoholic beverages to inebriates."[157] The plaintiff, who suffered from a disabling condition whose symptoms made him appear intoxicated, was told by a store that, pursuant to store policy, he could not purchase alcohol because he appeared intoxicated.[158] The plaintiff sued under Title III of the ADA, and after a bench trial the district court enjoined the store from continuing to enforce its "refusal to reconsider [the judgment of a salesperson as to intoxication]" policy.[159]

On appeal, the defendant claimed that the requested modification was "unworkable and that its implementation would fundamentally alter the nature of its business."[160] The defendant invoked what the court termed a "parade of horribles" by envisioning the compulsory sale of alcohol to inebriated individuals posing as disabled in contravention of Maine law.[161]

The court defined the central question underlying its analysis of the fundamental alteration issue as whether or not the defendant's "unbending 'refusal to reconsider' policy is sufficiently essential to its stated goals to justify its discriminatory effect."[162] Noting that the ADA mandates an individualized query, the court found that "the ADA proscribes mechanical resort to an inflexible 'refusal to reconsider' policy."[163] This holding comports entirely with the ADA's premise that

156. *See* Dudley v. Hannaford Bros. Co., 333 F.3d 299, 309 (1st Cir. 2003).

157. *Id.* at 301.

158. *Id.*

159. *Id.* at 303.

160. *Id.* at 309.

161. *Id.*

162. *Id.*

163. *Id.* at 310–11; *see also* Singh v. George Washington Univ., 368 F. Supp. 2d 58, 71 (D.D.C. 2005) (determining that a proposed modification to a medical school's policy was reasonable). In *Singh*, the court applied *Dudley* to a reasonableness query in its determination that a medical school's refusal of a former student's request that it reconsider her dismissal in light of her recently diagnosed

entities' policies must afford the disabled broad access to societal participation. Notwithstanding, the court contemplated whether the policy would effect a fundamental alteration by looking at the overall execution of the policy, not by focusing solely on the facts of the underlying case.

4. Courts' Varying Degrees of Depth and Breadth of Analysis

Perhaps the most overarching concern that emerges upon a review of the cases issued in the five years since *Martin* is how inconsistent the analyses are. Although the ultimate question is quite fact-driven and circumstance-specific, courts have no guidelines as to the scope of the considerations they ought to look at regarding the facts and the law surrounding this most philosophical question (breadth of analysis). They similarly have no indicia as to how searching or probing a look to give a defendant's self-characterization and the point at which it will be fundamentally altered (depth of analysis). As a result, some analyses are terse and conclusory whereas others are detailed and explicit.

An examination of other cases illustrates that courts have come to a determination as to the fundamental alteration query by looking to any number of factors, and while some patterns have emerged, no formal guidelines have been set as to which and how many factors to weigh.

In *Fortyune v. American Multi-Cinema, Inc.*,[164] the plaintiff, who was quadriplegic, sued a movie theater under Title III of the ADA after the theater, pursuant to its written policy[165] regarding sold-out shows, refused to eject a "noncompanion" patron from the designated "companion seat" adjoining a space reserved for a wheelchair so that his wife could sit next to him during a sold-out film screening.[166] The district court issued an injunction requiring the theater to ensure that wheelchair-bound patrons be allowed to sit next to their companions.[167]

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learning disability violated Title III of the ADA. *See id.* The court noted that the so-called "second chance doctrine," which "works to deny already accommodated and at-fault plaintiffs from winning an endless string of new accommodations after each failure," will not "apply to plaintiffs who, through no fault of their own, have not yet had a chance to get the modifications they need." *Id.* (citing *Dudley*, 333 F.3d at 299).

164. 364 F.3d 1075 (9th Cir. 2004).

165. According to the theater's training manual, "[i]n situations in which the auditorium is legitimately 'sold out,' companions of guests using wheelchairs will be exposed to the same risk of less desirable seating as non-disabled couples who are sold 'single' seats. In a sold out situation, everyone shares the same risk of being unable to sit together." *Id.* at 1079 n.2.

166. *Id.* at 1078–79.

167. *Id.* The injunction read:

> Defendant must modify its policies regarding companion seating to ensure that a companion of a wheelchair-bound patron be given priority in the use of companion seats. A noncompanion may sit in a companion seat when the seating is not needed by a wheelchair-bound patron and his or her companion. However, if a noncompanion is seated in a companion seat needed by a wheelchair-bound patron and his or her companion, Defendant must ensure that the companion seat is made available to the companion, so long as the wheelchair-bound patron and his or her companion arrive at the wheelchair

The Ninth Circuit upheld the district court's grant of summary judgment and grant of permanent injunctive relief, holding that the ordered modification did not "fundamentally alter the nature of the services provided by the Theater" because:

> [a]ll aspects of the Theater and its policies survive the requested relief intact, save one: AMC must now ensure that companion seats are available to the companions of wheelchair-bound patrons until ten minutes prior to showtime, even if a person not accompanying a wheelchair-bound patron refuses to move. This change will have a negligible effect—if any—on the nature of the service provided by the Theater: screening films. While the individual who is made to move seats will experience the film in a different manner (*i.e.*, from a different location in the Theater), this shift is modest and does not rise to the level of a "fundamental alteration" of the Theater itself.[168]

Having thus quickly determined that the "nature" of the entity at issue was "screening films," the court did not dwell much on weighing any factors very formally. Rather, it came to the ready conclusion that any impact made by the policy change would be "negligible" and quickly termed the feared impact on third parties "modest."

Courts vary as to what they will consider when evaluating a fundamental alteration query. Some courts have, without much analysis, determined that an adverse affect on third parties could in fact render an accommodation a fundamental alteration. In *Larsen v. Carnival Corp.*,[169] a cruise ship passenger and his wife sued the cruise line that they were supposed to travel on after a forced medical disembarkation arguing, among other things, that the defendant violated Title III by failing to wait indefinitely in port until a replacement medical device could be procured for the plaintiff.[170] The court agreed with the defendant that the delay in departure that the plaintiffs sought would have "interfered with scheduled port stops on the cruise and the plans of other passengers for those port stops," and thus that "requiring the ship to wait indefinitely before leaving port would constitute a fundamental alteration."[171]

In *Ass'n for Disabled Americans, Inc. v. Concorde Gaming Corp.*,[172] the plaintiffs, disabled patrons and an association advocating rights of disabled individuals, alleged among other things that a casino ship violated Title III of the ADA because the craps tables were too high and thus inaccessible to wheelchair-bound players.[173] The plaintiffs proposed

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seating area at least ten (10) minutes prior to show time.

Id. at 1079.

168. *Id.* at 1084 (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001)).

169. 242 F. Supp. 2d 1333, 1344 (S.D. Fla. 2003).

170. *Id.* at 1339–41, 1344.

171. *Id.* at 1344.

172. 158 F. Supp. 2d 1353 (S.D. Fla. 2001).

173. *Id.* at 1355–56, 1366.

two modifications: (1) permitting the disabled players affected to play at the areas on the table designated for the game's attendants, which had a lowered railing; and (2) lowering the table's railing at particular spots or lowering the whole table.[174] The court found that both of these proposed modifications would amount to fundamental alterations.[175]

The court found that the "dispute over accessibility to the craps tables resinates [sic] with the justiciability concerns identified by Justice Scalia" in *Martin*, but stated nonetheless that it was obligated to apply *Martin*.[176] Its analysis appeared to center around the drastic physical alteration of the site of play and the potential adverse impact on third parties:

> Craps is a common casino game, and it is played under common conditions, including the positioning of the players and the boundaries of the playing surface. Lowering the rail of a craps table or lowering the entire table would alter the playing surface in a manner that is the equivalent of changing the dimensions of a playing field or the size of the diameter of a golf hole. . . . Moreover, allowing disabled players to play from a spot on the table that other players cannot play from may provide the disabled players with an advantage not enjoyed by the other players.[177]

Similarly, in *Cruz ex rel. Cruz v. Pennsylvania Interscholastic Athletic Ass'n, Inc.*,[178] the district court looked to the effect of an accommodation on third parties and on competition when it entertained a nineteen-year-old high school student's request for an injunction ordering the waiver of a rule setting a maximum age for participation in interscholastic athletic competitions.[179] The court found that the plaintiff's "playing on the football team and track team would not fundamentally alter the nature of P.I.A.A. interscholastic competition," but that it was "not clear on the record if that can be said about wrestling."[180] The court said the reason for this was that when it came to football and track:

> Luis Cruz is not a "star" player in any of his interscholastic sports [,] . . . [but rather was] included in the football program for an inclusive experience. He is a marginal player and appeared in football games on a very limited basis such as a few kickoffs where the performance apparently was not critical. . . . Cruz is not more experienced than other players. In fact, he is less experienced and therefore has played football only on a very limited basis. Further, he is five foot three inches tall and weighs 130 pounds, which is by no means greater than the average height and weight of other, even younger, participants. It is

174. *See id.* at 1366.
175. *Id.*
176. *Id.* at 1367 n.9.
177. *Id.* at 1367.
178. 157 F. Supp. 2d 485 (E.D. Pa. 2001).
179. *Id.* at 499.
180. *Id.*

> thus readily apparent that there is no safety threat to others or competitive advantage in the situation presented here. Also, again, there is no "cut" policy on the football squad, so Luis Cruz is not replacing any other student who would otherwise have an opportunity to play. . . . In track, where there is also a no-cut policy, Luis Cruz is not a fast runner, does not displace other students, has no competitive advantage and represents no safety risk.[181]

In *Murphy v. Bridger Bowl*, a disabled plaintiff sued a ski facility under Title III of the ADA alleging that she should be able to have her husband accompany her on a special "ski bike" in contravention of the facility's policies.[182] The district court had entered summary judgment in favor of the facility, finding that it did not have to make the requested accommodation because doing so would fundamentally alter the nature of the services it provided.[183] The Court of Appeals affirmed the grant of summary judgment but nonetheless found that "[t]he use of a ski bike 'is not itself inconsistent with the fundamental character of' Bridger Bowl's business, which provides access to its slopes for skiers."[184]

Although the court ultimately found that the plaintiff's claim would fail because she did not demonstrate the necessity of her proposed accommodation,[185] the court found that as to the fundamental alteration query, the plaintiff's own "history of safely using a ski bike at Bridger Bowl demonstrates the existence of a genuine dispute of fact regarding whether the addition of one other ski bike on the slopes would fundamentally alter the scope of its business."[186] Thus, the *Murphy* court weighed the history of the accommodation as it had already been made as a consideration that ultimately foreclosed the determination made by the district court as a matter of law.

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181. *Id.* at 493.

182. 150 F. App'x 661, 662 (9th Cir. 2005).

183. *Id.*

184. *See id.* (quoting PGA Tour Inc. v. Martin, 532 U.S. 661, 683–85 (2001)).

185. The plaintiff in *Murphy* contended that in order to improve upon her skills, she required the company of a companion using the same equipment that she used. 150 F. App'x at 663. However, although the plaintiff's proposed expert opined that her compromised ability to learn would be enhanced by the "presentation of information using a variety of strategies," he failed to indicate that the precise accommodation that she requested was in fact necessary for her to improve upon her skills. *Id.* Thus, the Court found that the proposed accommodation was not necessary. *Id.* In Logan v. American Contract Bridge League, 173 F. App'x 113, 115 (3d Cir. 2006), the plaintiff, an accomplished bridge player with a severe visual impairment, sued the Bridge League after it refused to permit him to use "his own special deck of cards designed for the visually impaired," following complaints from other players. The court found that because the plaintiff "admit[ted] that the . . . [d]eck is not *necessary* to give him access to ACBL competitive bridge; he merely claims that without it, he 'can't play to the maximum of [his] potential,'" he did not have a valid claim, but rather one like that contemplated by the *Martin* Court—one "'that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary.'" *Id.* at 117 (quoting *Martin*, 532 U.S. at 682).

186. *Murphy*, 150 F. App'x at 663.

Another post-*Martin* opinion also looked to an accommodation's history, but weighed this history against the proffered purpose of the defendant entity in maintaining the policy in question. In *Matthews v. NCAA*, a learning disabled college football player sued the NCAA to obtain a waiver of its "75/25 Rule" regarding academic eligibility.[187] The court found that the requested waiver was reasonable and would not engender a fundamental alteration of the defendant's purpose and policies because two previous waivers of the rule had already been afforded to the plaintiff.[188] The court also weighed the NCAA's objectives in enforcing its policy but determined that evidence that the plaintiff "significantly exceeded other NCAA minimum requirements, such as the minimum grade point average," meant that a waiver of the requirement "would not have 'essentially negated' the NCAA's mission of promoting student-athlete academic achievement."[189]

The court held that:

> Like in the *Martin* case, neither the game of football nor a college course of study requires students' completion of 75 percent of their coursework outside of summer school. The NCAA's mission to promote academics may be achieved through a number of policies and rules not implicated by granting Plaintiff one additional waiver of the 75/25 Rule. Furthermore, granting a waiver to Plaintiff would not result in him gaining any unfair advantage. It would merely provide a modification that would permit Plaintiff access to competitive college football . . . while he pursues his degree in an academic program tailored to his learning disability.[190]

Cost has also emerged as a factor in cases brought under Title II. In *Tsombanidis v. City of West Haven*, the owner and residents of a group home for recovering alcoholics and drug addicts sued the city of West Haven alleging, among other things, that it violated Title II of the ADA when it denied the home a special use exception to zoning laws that would permit the home to operate in a single-family residential district.[191]

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187. 179 F. Supp. 2d 1209, 1215–17 (E.D. Wash. 2001). Under this rule, collegiate student-athletes were required to earn 25% of the credit hours required for a degree by the completion of their second year of college, and 75% of their annual required credit hours during the regular academic year. *See id.*

188. *See id.* at 1226 (noting that it was "difficult, particularly in light of the individualized inquiry required by *Martin*, to see how granting a third waiver to Plaintiff would fundamentally alter the NCAA's purpose, when the first two waivers did not," and that "[i]n cases where courts have found that a modification of NCAA rules would constitute a fundamental alteration not required by the ADA, the NCAA had never consented to grant the modification requested"). *But see* Doe *ex rel.* Doe v. Haverford Sch., No. 03-3989, 2003 WL 2209778, at *9 (E.D. Pa. Aug. 5, 2003) ("There is not a statutory provision that converts prior modifications into required reasonable modifications for an indefinite time period. If the Court imposed that requirement, the incentive for covered entities to go beyond the ADA's requirements would be diminished.") (citation omitted).

189. *Matthews*, 179 F. Supp. 2d at 1226.

190. *Id.* at 1226–27.

191. 180 F. Supp. 2d 262, 292 (D. Conn. 2001), *aff'd in part and rev'd in part on other grounds*, 352

"Without this accommodation," the court explained, "recovering alcoholics and drug abusers would not have the opportunity to live in a single-family neighborhood because of the number of residents necessary to make the . . . model functionally successful and economically feasible."[192]

The court found that "[a]llowing seven unrelated . . . residents to live together in a house, which is operated much like any other single-family residence, will not fundamentally alter the nature of a single-family neighborhood and will not effect a 'fundamental change' in the City's existing zoning" because "[t]here is virtually no cost to the City associated with this requested accommodation."[193]

In *Williams v. Wasserman*, developmentally disabled residents of state psychiatric institutions alleged that their state failed to provide them with community treatment in contravention of the ADA, but the defendant argued that accommodating the plaintiffs would create a fundamental alteration to its program "because it would be unmanageably expensive to accelerate the process of finding or creating community placements for . . . patients beyond the efforts already being made."[194] The court explicitly acknowledged the deference it felt bound to confer and found that "[t]he State is entitled to wide discretion in adopting its own systems of cost analysis," and that courts "must be cautious when [they] seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute."[195] It subsequently found that against the factual backdrop before it, which included a "three to five year time frame," and the state's "need to maintain a minimum number of hospital beds and also to fund placements for other persons in need of community treatment, the State's progress in placing [plaintiffs] into the community ha[d] been acceptable."[196] It also found that "[t]he immediate shift of resources sought by plaintiffs would have resulted in a fundamental alteration of the State's provision of services."[197]

III. TOWARD A UNIFORM FRAMEWORK AND CONSIDERATIONS FOR THE FUNDAMENTAL ALTERATION QUERY: A PROPOSAL

Uncertainty about *Martin*'s precise mandates and the correct application of the fundamental alteration query in various contexts and

F.3d 565 (2d Cir. 2003).

192. 180 F. Supp. 2d at 293.

193. *Id.* (noting a lack of evidence that a financial, administrative, or public safety burden would be imposed with the granting of the accommodation).

194. 164 F. Supp. 2d 591, 631 (D. Md. 2001).

195. *Id.* at 632.

196. *Id.* at 638.

197. *Id.*

against various backdrops persists. As courts struggle to construct a cogent discourse about this issue, and commentators continue to note that "the uncertainty that Justice Scalia highlight[ed] in the process of determining the 'essence' of a sport makes almost all claims uncertain,"[198] it becomes necessary to return to the basic premise of the ADA in attempting to craft a workable framework.

The ADA is a critical vehicle for social change. The fundamental alteration query posed in cases brought under Titles II and III calls upon courts to resolve the tension generated between the competing and compelling interests of: (1) mandating institutional change to afford the disabled entrée to participation in society and (2) affording autonomy to societal entities such that they retain the latitude to determine and design what they will offer to and demand of patrons and participants. Courts' location of this "tipping point" at which various entities are deemed to have been impermissibly transformed is a process that needs to be transparent, rather than conclusory or otherwise opaque. This process embodies a determination of how society conceptualizes various social, recreational, and government institutions and services, as well as an assessment of how much deference society will accord an entity in defining itself and what it does.

This Article posits that the way in which the fundamental alteration query is framed—the defining of precisely what it is that must not be fundamentally altered—is a distinct and crucial part of the requisite analysis that has not been explicitly examined by the courts addressing the issue. Rather, as discussed, courts have tended to refer, in large part, to the question of whether or not a "fundamental alteration" occurred without filling in an antecedent,[199] or they have conclusorily framed the issue in an ad hoc manner that predicated the resulting determination without addressing the parties' proposed formulations of the question or at least justifying their own.[200]

Underlying courts' framing of the issue and how they answer the fundamental alteration question, is the level of deference that they will accord to various entities in defining their own characteristics and asserting the rights they claim are not to be impermissibly transformed. This deference must be explicitly articulated, acknowledged, and weighed by the courts conferring it. Then, the ensuing analysis—the universe of relevant considerations and the depth of the query—should be shaped by the level of deference accorded and by the nature of the remedy at issue. As to the substance of the analysis itself, while the very nature of the fundamental alteration query renders it fact-intensive, the

198. Greely, *supra* note 84, at 108.

199. *See supra* Part II.B.1.

200. *See supra* Part II.B.2.

framework within which it is resolved should be contoured by some unifying considerations. Compelling courts to articulate their analyses of these considerations will foster a cogent discourse.

A. Framing the Issue First

Although the Court in *Martin* investigated the long history of "golf" as it has been played over time and around the world, as well as the validity of the PGA's contention that injecting fatigue into the game was a central element of the competitive tournament at issue,[201] it remained unclear throughout the opinion precisely *what* was being preserved and could not be fundamentally altered.

In light of the ambiguity and confusion engendered by *Martin*'s failure to explicitly and consistently identify that which could not be altered, it is axiomatic that any court addressing fundamental alteration must bifurcate the query before it. First, the court must frame the issue of what is in danger of being fundamentally altered; *then*, the court must undertake the task of ascertaining whether or not the fundamental alteration will occur. A court should acknowledge situations in which the parties disagree as to the framing of the issue and state each side's proposed framing before either selecting one or formulating one of its own. In this way, any opacity that might obscure the court's initial construction of the issue will be avoided.

Justice Scalia asserted in his dissent in *Martin* that "the assumption which underlies th[e] question" posed by the Court as to whether golf's "essence" would be altered by the accommodation is false because "[n]owhere is it writ that PGA TOUR golf must be classic 'essential' golf."[202] According to Justice Scalia, it would be beyond the competence of even the Supreme Court to proclaim one of the PGA's rules nonessential because the rules are "entirely arbitrary."[203] Inasmuch as this thinking highlights the fact that a certain amount of deference ought to be accorded to the PGA as an autonomous entity in its initial definition of the game whose tournament it chooses to oversee, it is compelling.

However, unless sports are wholly exempted from the ADA—a proposition that has garnered no support from the Supreme Court[204]—translating this thinking into wholesale deference to and insulation of the PGA ignores the underlying premise of the ADA: that entities employing or otherwise serving the public *are* obligated to modify

201. PGA Tour, Inc. v. Martin, 532 U.S. 661, 672, 685 (2001).

202. *Id.* at 699 (Scalia, J., dissenting).

203. *See id.* at 700.

204. *See id.* at 689 n.51 (majority opinion) (noting that "petitioner's questioning of the ability of courts to apply the reasonable modification requirement to athletic competition is a complaint more properly directed to Congress, which drafted the ADA's coverage broadly, than to us").

requirements, policies, and rules in comportment with the mandate that they reasonably accommodate disabled individuals and afford them societal access that inaction on the part of the legislature and the courts might otherwise deny. Thus, a middle ground must be negotiated whereby some presumptive deference is accorded to the defendant, and then the defendant's proffered "essence" is scrutinized. In ADA employment cases brought under Title I, the plaintiff is required to establish that despite being disabled, he or she is "otherwise qualified" to perform the "essential functions" of the held or desired position with or without a reasonable accommodation.[205] Employers are presumptively accorded some deference in defining the "essential functions" of a position.[206] Similarly, the defendant entity asserting a fundamental alteration defense under Titles II or III of the ADA should be accorded at least some presumptive deference in setting forth that which must not be fundamentally altered.

B. The Need to Contour the Scope of the Analysis

Courts undertaking to get past the initial framing of the issue and to resolve the fundamental alteration query will invariably engage in something akin to an "industry analysis," whereby they will examine the effect of the proposed modification on the functioning of the defendant. Only by using set factors to contour the breadth and depth of the ensuing analysis will courts create a meaningful body of jurisprudence in this area. However, as discussed, without clear guidance as to the appropriate parameters of this analysis, courts have performed ad hoc analyses of variable breath and depth.

1. Breadth: Defining the Relevant Universe of Considerations

By way of example, the Court in *Martin* undertook to determine whether waiving the walking rule "might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally."[207] Attempting to identify and employ "the

205. 42 U.S.C. § 12111(8) (2000); *see also* Walters & Chanti, *supra* note 95, at 750 (observing that "[i]t is instructive to look at Title I for assistance in developing a framework for analysis of the fundamental alteration defense just as courts have done in looking at other elements of a Title III claim").

206. *See id.* ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential."); Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445–46 (8th Cir. 1998) ("An employer's identification of a position's 'essential functions' is given some deference under the ADA." (citing 42 U.S.C. § 12111(8)). In order to overcome the deference given to employers, a plaintiff "must offer sufficient evidence to show the employer's understanding of the essential functions of the job is incorrect." Basith v. Cook County, 241 F.3d 919, 928 (7th Cir. 2001); *see also* DePaoli v. Abbott Labs., 140 F.3d 668, 674 (7th Cir. 1998) ("Although we look to see if the employer actually requires all employees in a particular position to perform the allegedly essential functions, we do not otherwise second-guess the employer's judgment in describing the essential requirements for the job.") (citation omitted).

207. PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001).

fundamental character of the game of golf," the Court looked to an abstraction of the game as it posited that it is and has been classically played.[208] It also relied on anecdotal evidence and what appeared to be *sua sponte* observations generally regarding the way in which golf is played and how competitions are won.[209]

In its Brief to the Supreme Court, the PGA attempted to define the relevant query as whether or not waiving the walking rule would fundamentally alter the competition that *it* was trying to administer and substantively skew the game that *it* sought to have played. The frame of reference used by the PGA to bolster its contentions involved a search into the history of its own competitions ("The 'walking rule' has been an integral part of Tour competitions since their inception") and an examination of the purpose of the rule in the context of *its* specific purpose in administering the tournament at issue as one of "those top-level competitions [distinguished] from other, less demanding competitions."[210]

By looking to the history and evolution of the game across time and across contexts (in various tournaments),[211] however, the Court arguably engaged in the surveillance of a landscape much broader than that posited by the PGA, protracting the breadth of the analysis in terms of that which was deemed relevant to pinning down the "fundamental character" of the game. Moreover, the Court's interposition of its own anecdotes and observations about the game of golf and the extent to which luck versus skill dictates its outcome, was, as discussed, a great departure from the narrow contours of the game as the PGA defined and oversaw it.[212] The basis for this departure, had it been made clear, would have been instructive for future courts.

2. *Depth: How Searching a Look to Give the Defendant's Recitation of What Defines it and the Point at Which it Is Fundamentally Altered*

The PGA also observed in its Supreme Court Brief that "a court cannot tell whether a particular change in policy will 'fundamentally

208. *See id.* at 683.

209. *See id.* at 687.

210. Brief for Petitioner, *supra* note 65, at 37 (noting that "the 'walking rule' is observed without exception in every other elite golf tournament throughout the world—from the Masters and United States Open in this country to the British Open and similar tournaments overseas").

211. *See Martin*, 532 U.S. at 683–84.

212. *See id.* at 687 n.48. The court observed:

> A drive by Andrew Magee earlier this year produced a result that he neither intended nor expected. While the foursome ahead of him was still on the green, he teed off on a 322-yard par four. To his surprise, the ball not only reached the green, but also bounced off Tom Byrum's putter and into the hole.

Id. (citing John Davis, *Magee Gets Ace on Par-4*, ARIZ. REPUBLIC, Jan. 26, 2001, at C16).

alter' the nature of a good or service without giving close scrutiny to what the basic nature of that good or service is."[213] Just as with the breadth of analysis, the depth of a court's inquiry into the fundamental alteration question can vary considerably based on the deference accorded to a defendant in its conceptualization of the "fundamental character" or nature of that put at issue.

The depth of analysis gone into by the Court in *Martin*, like the breadth, considerably expanded the scope of the query as posited by the PGA. The Court, as discussed, examined whether waiving the walking rule would amount to "a less significant change that has only a peripheral impact on the game itself," but which "might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others."[214] The PGA suggested that the search into this question could not be too searing in any event because "[a]ny genuine comparison among individual athletes must take into account an almost infinite variety of physical attributes," and that "[a]gainst this background of physical differences, the task of conducting an accurate hypothetical contest between one competitor and another, with each performing under different substantive rules, is too great for any fact-finder" because "[t]here is no sound way to anticipate or replicate those results in judicial proceedings."[215] Moreover, the PGA noted that in fact "[m]edical experts on both sides testified at trial that, because of physical differences and numerous other variables that affect fatigue, it is 'impossible' to compare the levels of fatigue experienced by different individuals or to compare the relative effects of such fatigue."[216]

For these reasons, the Court in *Martin* might have used this evidence to conclude that the "substantive advantage" strand of the query could not have been pursued any further. Instead, however, the Court pressed the inquiry, going beyond the variable of fatigue and plunged deeper into the analysis by discounting the need to rigidly apply all requirements to all players and noting that variables like the weather randomize the game, making it such that "[a] lucky bounce may save a shot or two."[217] With a defendant to whom the Court chose to accord more deference or in an area in which the Court felt that it had less competence to hypothesize and postulate as it did, the analysis as to this question may

213. Brief for Petitioner, *supra* note 65, at 31.

214. *Martin*, 532 U.S. at 682–83.

215. Brief for Petitioner, *supra* note 65, at 39. The PGA went on to argue that

> [i]t is true, of course, that golf does not separately measure the act of walking the course: the only score recorded is the number of strokes taken from the teeing ground to the hole. But this fact does not mean that the task of shot-making and the task of walking during the competition are disconnected.

Id. at 38.

216. *Id.* at 40 n.27.

217. *Martin*, 532 U.S. at 687.

very well have been more shallow.

3. Stated Trends in Deference

Some federal and state courts adjudicating disability discrimination cases have explicitly acknowledged deference that they were statutorily compelled to confer upon defendants or deference that they determined was merited by a particular defendant or arena of litigation. Religious organizations and religious entities controlled by religious organizations, for example, are wholly exempt from the mandates of the ADA.[218]

In other instances, however, courts have determined and expressly stated that certain defendants in certain circumstances warrant a greater degree of deference than would ordinarily be accorded. In *Southeastern Community College v. Davis*,[219] the Supreme Court was faced with the issue of whether the Rehabilitation Act[220] compelled a college to make certain significant changes to its nursing program in order to accommodate a disabled student with hearing loss. The Court found that because there was no way that the plaintiff could participate in the defendant's program unless the standards were substantially lowered and because the Rehabilitation Act "imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person, . . . nothing in the Act requires an educational institution [like the defendant] to lower its standards."[221] At the core of this mandate lies a judicial conception of

218. *See* 42 U.S.C. § 12187 (2000) (providing that "[t]he provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000-a(e)) . . . or to religious organizations or entities controlled by religious organizations, including places of worship"); *see also* Woods v. Wills, 400 F. Supp. 2d 1145, 1161 (E.D. Mo. 2005) ("Religious organizations and entities controlled by religious organizations have no obligations under the ADA. Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage.").

219. *See* 442 U.S. 397, 397 (1979).

220. 29 U.S.C. §§ 701–796 (2000).

221. *Davis*, 442 U.S. at 413; *see id.* at 414 ("Nothing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program."). In *Davis*, the Court first enunciated the "fundamental alteration" language when it held that the plaintiff's proposed modifications were not permissible because "such a fundamental alteration in the nature of a program is far more than the 'modification' requires." *Id.* at 410. Subsequent to *Davis*, the Department of Justice incorporated the Court's "fundamental alteration" language into their definition of "qualified handicapped person" in the Federal Regulations. *See* Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs, 49 Fed. Reg. 35,724 (Sept. 11, 1984); 28 C.F.R. § 39.103 (2006). The legislative history of the ADA indicates that this language was taken from section 504 of the Rehabilitation Act and its corresponding regulations. H. COMM. ON EDUC. AND LABOR, 101ST CONG., LEG. HIST. OF PUBLIC LAW 101-336 (Comm. Print 1991). *See also* Alexander v. Choate, 469 U.S. 287, 301 (1985). The court noted:

> The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified

academic freedom meriting a certain level of insulation from judicial review.[222]

In fact, courts have repeatedly recognized that universities retain dominion over "what may be taught, how it shall be taught, and who may be admitted to study."[223] Courts have deferred to educational institutions, regulating bodies, and licensing boards where the courts believed that the issue being decided was one within the purview of the entity's expertise.[224] The circuits have recognized, for example, that "[i]t is beyond question that it would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program. An educational institution is not required by the . . . ADA to lower its academic standards for a professional degree,"[225] and "a university can refuse to modify academic degree requirements - even course requirements that students with learning disabilities cannot satisfy - as long it 'undertake[s] a diligent assessment of the available options' and makes 'a professional, academic judgment that reasonable accommodation is simply not available.'"[226]

> handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Id.

222. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (noting that academic freedom can only flourish where the unfettered exchange of ideas among teachers and students is permitted).

223. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

224. For a discussion of the cases where courts have drawn the line between cases in which they felt deference was warranted and those in which they felt that it was not, see Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student-Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049, 1122 (1999) ("The deference accorded to academic institutions, whose full-time business and mission is academics, arguably should not be extended to the NCAA [on eligibility issues], which is not necessarily qualified to make academic decisions.").

225. Mershon v. St. Louis Univ., 442 F.3d 1069, 1076 (8th Cir. 2006). See also 34 C.F.R. § 104 app. A ¶ 31 commenting on the Rehabilitation Act of 1973 and noting that while

> an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student[, i]t should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

226. Guckenberger v. Boston Univ., 974 F. Supp. 106, 148–49 (D. Mass. 1997) (quoting Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992); Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 27–28 (1st Cir. 1991)). The Guckenberger court noted that academic freedom buttressed the conferral of latitude upon institutions of higher education when it came to standards, and thus that "even though an educational institution must modify its academic requirements to accommodate a disabled student, an institution need not waive academic requirements that are essential to its program or course of study." *Id.* at 145; *see also* Toledo v. Sanchez, 454 F.3d 24, 39–40 (1st Cir. 2006) ("[T]he ADA does not require public schools and universities to accommodate disabled students if the accommodation would substantially alter their programs or lower academic standards, and courts give due deference to the judgment of education officials on these matters."); McGregor v. La. State Univ.

In *School Board of Nassau County v. Arline*, the Supreme Court, faced with evaluating a school board's decision to terminate a teacher with a dormant but recurring contagious disease, discussed the issue of the deference to be accorded an institutional decision maker in a disability discrimination case.[227] The Court determined that findings as to the risks entailed ought to be "'based on reasonable medical judgments given the state of medical knowledge.'"[228] The Court went on to hold that trial judges, in the course of making these findings, ought to defer to the reasonable medical judgments of public health officials.[229]

In *Wynne v. Tufts University School of Medicine*, the First Circuit undertook to define the "obligation of an academic institution, a university medical school, when it seeks to demonstrate as a matter of law that there is no reasonable means available to accommodate a handicapped person."[230] The court analogized the competing interests underlying cases involving a single person suing an academic institution to those cases in which an individual seeks redress because a governmental official has abused his or her authority.[231] This analogy was premised on the tension generated when the rights of the disabled conflict with the latitude properly afforded an institution.[232]

Thus, the court noted, qualified immunity has been extended to officials for "actions that did not violate clearly established rights . . . as a matter of law without extensive proceedings."[233] Applying a similar tack to the reasonable accommodation query, the Court devised the following test:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards

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Bd. of Supervisors, 3 F.3d 850, 858 (5th Cir. 1993) ("The Supreme Court . . . made clear that § 504 [of the Rehabilitation Act of 1973] does not mandate that an educational institution 'lower or . . . effect substantial modifications of standards to accommodate a handicapped person,' assuming such standards are reasonable." (quoting *Davis*, 442 U.S. at 423)).

227. 480 U.S. 273, 288 (1987), *superseded by statute*, 29 U.S.C. § 794(d) (2000).

228. *Id.* (quoting Brief for American Medical Ass'n as Amicus Curiae in Support of Petitioners at 19, Sch. Bd. v. Arline, 480 U.S. 273 (1987) (No. 85-1277), 1985 WL 669434).

229. *Id.*

230. 932 F.2d 19, 20 (1st Cir. 1991).

231. *Id.* at 26.

232. *See id.* The court in *Wynne* analogized as follows:

> Just as in this case concern for the statutory rights of a handicapped individual is in tension with concern for the autonomy of an academic institution, so in the official [] setting is concern for protecting individual constitutional rights in tension with concern for insulating officials from personal monetary liability and harassing litigation that would unduly inhibit discharge of their duties.

Id.

233. *Id.*

> or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a "purely legal one." Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.[234]

In *Powell v. National Board of Medical Examiners*, the plaintiff argued that the University of Connecticut and the National Board of Medical Examiners discriminated against her in violation of Titles II and III of the ADA when her continued course of study in the school's medical program was conditioned on her passing the United States Medical Licensing Examination administered by the National Board without her requested grant for additional time in which to complete the exam.[235] The issue became one of whether or not plaintiff was "otherwise qualified" to continue in medical school.[236]

Noting that "[w]hen reviewing the substance of a genuinely academic decision, courts should accord the faculty's professional judgment great deference," the Court concluded that the University of Connecticut was within its authority to determine

> that in order for it to adhere to the demanding standards of a medical school responsible for producing competent physicians, it needed to require plaintiff to pass Step I. The accommodation requested by plaintiff . . . would have changed the nature and substance of UConn's program. Other underperforming students were required to prove their mastery of this knowledge before being allowed to advance. Permitting a student who did not definitively prove her mastery of basic medical sciences to advance into the later stages of medical school, and become a treating physician who had direct contact with patients was something the medical school correctly believed would unreasonably alter the nature of its program.[237]

As to the National Board, the court held that "[w]ere the National Board to depart from its procedure, it would be altering the substance of the product because the resulting scores would not be guaranteed to

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234. *Id.* (citation omitted).

235. 364 F.3d 79, 81–82, 84 (2d Cir. 2004).

236. *Id.* at 87. In addition to bringing her claim under Titles II and III of the ADA, the plaintiff also brought it under the Rehabilitation Act. *Id.* at 84. Section 504 of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any [covered] program or activity." 29 U.S.C. § 794(a) (2000). Indeed, the "otherwise qualified" query, like the fundamental alteration query, begs the question of what it means to be qualified and what the "essence" of the employment, activity, or operation at issue truly is.

237. *Powell*, 364 F.3d at 88.

reflect each examinee's abilities accurately."[238] It is this notion of the "substance of the product" of an educational or professional licensing program as being within the sole purview of the administrative entity to shape and define that underlies the added deference that courts will give these defendants and not others.

Courts have similarly articulated a certain amount of deference for states who, forced to choose among numerous compelling and competing interests in the course of making funding decisions, have economic decisions challenged as violative of Title II:

> The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. We must be cautious when we seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute.[239]

Often, when articulated, the issue of courts' deference to defendants is anchored to courts' assessments of their own competence, or lack thereof, in the arenas of the litigations. The Supreme Court has noted that "[c]ourts are particularly ill-equipped to evaluate academic performance."[240] The Second Circuit, evaluating the question of whether a disabled plaintiff was "otherwise qualified" to sue under the Rehabilitation Act,[241] took explicit note of "a court's limited ability, as contrasted to that of experienced educational administrators and professionals, to determine an applicant's qualifications and whether he or she would meet reasonable standards for academic and professional achievement established by a university or a non-legal profession."[242] Thus, in light of the courts' limited capability in the area of higher education, "considerable judicial deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons."[243]

There is, therefore, precedent for courts' acknowledgement that

238. *Id.* at 89.

239. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 615 (1999) (Kennedy, J., concurring); *see also id.* at 604 (majority opinion) ("Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."); Williams v. Wasserman, 164 F. Supp. 2d 591, 632 (D. Md. 2001) (noting the Supreme Court's rejection of "the district court's narrow view of a cost-based fundamental alteration defense").

240. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978).

241. *See supra* note 236 (discussing the Rehabilitation Act's prohibition of discrimination against those deemed "otherwise qualified").

242. Doe v. N.Y. Univ., 666 F.2d 761, 775–76 (2d Cir. 1981), *abrogated by* Zervos v. Verizon N.Y., Inc., 252 F.3d 163 (2d Cir. 2001).

243. Doe v. N.Y. Univ.; 666 F.2d at 776.

they have and will confer varying amounts of deference to various defendants under certain circumstances. This deference may be rooted in factors like courts' conceptions of a defendant's likelihood of discriminating against a protected class of people, or in factors that stem from courts' own perceptions of their capacity to make judgments about how the entity can and does operate. The issue then becomes one of using this deference as a lens through which to construct and view the question of whether or not a fundamental alteration occurred.

4. Deference as a Lens

The Supreme Court did not furnish any insight as to why it chose to accord the PGA so little deference in defining the contours of the analysis, and why it departed from the facts and from the tournament before it to such a large extent. The Court may have done this because the PGA was not just the administrator of a single tournament among many, but rather an administrative and governing body, emblematic of the sport and regarded as its "gatekeeper" or guardian. Perhaps the Court simply felt that its competence to delve into the domain of "golf" was not as conscripted as it would be if it were asked to delve into a subject more highbrow, such as a profession's standards.

Whether or not they are articulated, seeming "intangibles" like the presumptive deference accorded a defendant or the initial skepticism that a court harbors upon hearing the formulation of a fundamental alteration argument, predicate the breadth and depth of the ensuing analysis, and, often, the outcome of the fundamental alteration query. To the extent that these elements are not brought into the consciousness of the jurisprudence, and to the extent that the process by which the fundamental alteration query is formulated and executed is not transparent, decisions will be rendered increasingly inconsistent and ad hoc. Only with a consciousness that there are varying gradations of deference, and concomitantly, varying gradations of depth and breadth that a court can reach in its analysis of an entity or industry, can courts deliberately and somewhat predictably resolve a query so complex and nuanced.

Thus, once the issue of what should not be fundamentally altered has been properly framed by a court, the court must thus acknowledge that both the level of deference accorded the defendant and the scope of the remedy at issue or awarded below will guide its crafting of the relevant analysis. A given defendant in given circumstances will warrant a certain level of deference, located along a spectrum of that which could be accorded in theory.[244] For example, a court may choose to confer presumptive

244. It is interesting to consider how both the defendant's identity and the context in which the accommodation is sought shape courts' perceptions of how much deference to accord decision makers employed by the defendant. For example, is there any reason why those who employ athletes should retain less autonomy regarding day to day decisions than those who employ entertainers? *See, e.g.*, Richard P. Cole, *Law, Sports, and Popular Culture: The Marriage of a Relationship Scorned*, 23 W.

deference upon a professional organization or a regulating body governing many entities because it is obligated to preserve the integrity of a profession or institution.[245] Moreover, courts may choose to acknowledge that when it comes to the regulation of certain professions, or training or academic programs, they simply are not as competent to step in and undertake a holistic evaluation of what the profession truly is or what a course of study truly requires as they are to make judgments about the provision of goods or services in other contexts.

5. *Scope of the Remedy as a Lens*

The second lens through which the analysis should be filtered is the scope of the remedy at issue or the remedy ordered below. Specifically, if the remedy at issue involves an exception to a rule or the waiver of a rule for an individual or for an instance, that which should be considered will be vastly different from what should be considered when the remedy at issue is a broad-based, sweeping change in policy mandated by the lower court. Specifically, the analysis of whether or not a broadly-applicable, prospective policy change will constitute a fundamental alteration must necessarily contemplate a factual backdrop broader than that against which the litigation was brought.

It is one thing to abide by *Martin*'s mandate of an "individualized inquiry" and focus solely on the underlying facts of a case when the "essential" and "reasonableness" aspects of the proposed modification are analyzed. However, once the burden shifts to a defendant to show that the proposed change would effect a fundamental alteration on its operation, the universe of relevant facts and evidence must necessarily expand. Courts must take explicit note of the remedy at issue, its scope and its permanence, and define the relevant scale of analysis at the outset. On the other hand, the relative uniqueness of a remedy ought to limit the scope of that which a court may permissibly consider, with regard to whether or not a waiver will be widely available in the future and whether a broadly applicable policy is

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NEW ENG. L. REV. 431, 434–35 (2002) (reviewing PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS (Harvard University Press 2000)). In his article, Richard Cole addressed, among other things, why commissioners of professional sports leagues may be vested with the authority to discipline athletes employed by them. *Id.* at 434. The author identified "recurring rationales offered to distinguish professional athletes from entertainers" in this context. *Id.* The first, the so-called "integrity of competition rationale," is anchored in the notion that "the true essence of sports is athletic competition, a fierce struggle by players and teams pushing each other to new heights." *Id.* (internal quotations omitted). Thus, "[t]o assure the integrity of competition . . . requires that the leagues have a disciplinary authority over all players . . . [so that they may] present to the public a safe and orderly athletic contest." *Id.* at 434–35.

245. *See* Kelly M. Trainor, Note, *The NCAA's Initial Eligibility Requirements and the Americans with Disabilities Act in the Post-*PGA Tour, Inc. v. Martin *Era: An Argument in Favor of Deference to the NCAA*, 46 B.C. L. REV. 423, 459 (2005) ("[B]ecause the NCAA shares the same purpose as academic institutions—namely, maintaining academic integrity—and because the NCAA maintains a level of expertise in college academic performance commensurate with many colleges, courts should give the NCAA the same level of deference they afford to academic institutions when evaluating Title III claims.").

allowed to remain intact, among other things. Thus, the relative uniqueness or broad applicability of a remedy along the spectrum of those available should dictate whether the analysis is rooted more in the individual facts of the underlying case or in larger policy implications and projections.

6. A Useful Analogy

Antitrust law provides an extremely utile framework in which to evaluate questions of deference and fairness. In antitrust law, courts seeking to resolve the question of whether a given action is pro-competitive or anti-competitive execute an "industry analysis" in comportment with one of three gradations of presumptive deference and concomitant levels of analysis. The ADA's "fundamental alteration" query, like the question of competitive significance, essentially boils down to a question of how much deference a court should accord a defendant attempting to define that which it is trying to do and its impetus, objectives, and projected impact. Commentators critical of the courts' competence to adjudicate complex antitrust issues have noted that "[t]he confusion behind the standard of review . . . is symptomatic of a mismatch between the requirements of competition policy and the institutional role and capabilities of the judiciary."[246] It is thus the case, they maintain, that "[o]ver the long run, a series of ad hoc, short-term focused decisions can . . . appear arbitrary. . . . This offers little prospective guidance to market participants."[247] Similarly, where the parameters of courts' competence to evaluate a claim of fundamental alteration are construed widely and variably, as has been shown, and where no conscious guidance or framework for evaluating such claims exists, ADA law runs the risk of becoming arbitrary and unpredictable.

The overarching goal of antitrust law is to protect free and healthy commercial competition.[248] The Sherman Act[249] "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[250] Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[251] Nonetheless, the Supreme Court has refused to take this broad prohibition

246. *See, e.g.*, Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 784 (2004) ("The per se rule places minimal institutional burden on courts since it avoids getting into the economic details. Rule of reason analysis, on the other hand, is more satisfying in that it grapples with the economics, but places a larger burden on the judiciary.").

247. *Id.* at 787.

248. *See, e.g.*, S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61 (1985) (noting that antitrust law seeks to promote "unfettered competition in the marketplace"); Jefferson County Pharm. Ass'n, Inc. v. Abbott Labs., 460 U.S. 150, 178 n.7 (1983) (stating Sherman Act's goal as the "protection of the competitive process").

249. Sherman Antitrust Act, 15 U.S.C. §§ 1–37 (2000).

250. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.27 (1984) (internal quotations omitted).

251. 15 U.S.C. § 1.

literally, and has "long recognized that Congress intended to outlaw only unreasonable restraints."[252] In ascertaining whether a restraint is "unreasonable," courts have evaluated whether "its anticompetitive effects outweigh its procompetitive effects."[253] However, courts have acknowledged that "[e]ncouraging competition while at the same time forbidding anti-competitive behavior often requires walking a fine line,"[254] and that "[t]he fine line that separates healthy competitive effort from underhanded business tactics is frequently difficult to determine."[255] The distinction between procompetitive and anticompetitive actions is so fine at times so as to be barely discernible, precisely because it is so predicated on subjective assessments of an action's purpose, impetus, and projected effect.[256]

Similarly, the question of whether a modification will effect a fundamental alteration of an entity entails walking a fine line and making a highly subjective and fact-driven determination. Just as actions that are extremely procompetitive locate themselves along the same spectrum and just beside anticompetitive actions on the other side of an elusive "tipping point," so do modifications and accommodations that effectuate mandated change and those that engender a fundamental alteration of the entity. Both questions entail a delicate delineation accomplished only when the court has an understanding of the backdrop or "industry" against which to evaluate action or change at issue, and both questions invite an analysis whose breadth and depth can vary as the court sees fit.

In antitrust cases, a court adjudging an action to lie on one side of permissibility or the other will use one of several standards in discerning the "competitive significance" of the restraint, or whether or not the restraint enhances competition.[257] The "prevailing" standard for making this determination is the so-called "rule of reason."[258] Using this approach, the trier evaluates competitive significance against a backdrop of factors, "including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[259] This type of industry analysis affords a court "the opportunity to delve into the economic market . . . in a case where market dominance is not clear and anticompetitive elements are not established."[260]

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252. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

253. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990).

254. AAA Tire Finishing Equip. & Supplies, Inc. v. Tire Cosmotology, Inc., 583 F. Supp. 1530, 1532 (E.D. La. 1984); *see also* Monotype Corp. v. Int'l Typeface Corp., 43 F.3d 443, 456 (9th Cir. 1994) ("Competitive efforts and improper means may at times walk a fine line.").

255. Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 288 (E.D. Pa. 1966).

256. Dibadj, *supra* note 246, at 784 ("The point here is that even the most brilliant jurists are struggling with how to review antitrust cases.").

257. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984).

258. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

259. *Khan*, 522 U.S. at 10.

260. Christopher P. Campbell, Note, *Fit to Be Tied: How* United States v. Microsoft Corp. *Incorrectly Changed the Standard for Sherman Act Tying Violations Involving Software*, 22 LOY. L.A.

However, "[w]hen a restraint's negative impact on competition is immediately discernable and the restraint has no redeeming virtue, the *per se* mode of analysis applies."[261] While analysis employing the rule of reason permits inquiry into the intent behind the restraint, *per se* analysis does not allow analysis of a restraint's intended purpose, its competitive effect, or its pro-competitive justifications, but rather confers a "conclusive presumption of illegality"[262] where "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it."[263] It should be noted that "even the per se test incorporates some economic analysis"[264] of the relevant context in a threshold determination as to whether or not an action has been properly placed in the "per se" category.

Finally, some restraints "that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry" are analyzed using a middle-ground approach between the rule of reason and the *per se* realm—the truncated "quick look" rule of reason analysis.[265] This "quick look" approach is "reserved for circumstances in which the restraint is sufficiently threatening to place it presumptively in the per see class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications."[266] A trial court that has conducted a "quick look" analysis of a defendant's purported reasons for a restraint, may then go on to either (1) designate the restraint unlawful *per se*; (2) reject the evidence, but still harbor enough doubt about the fitness of the restraint for the *per se* category to take a "quick look" into market power; or (3) deem the evidence plausible so as to place the restraint within the purview of rule of reason analysis.[267]

The Supreme Court recently acknowledged the need for the "quick look" approach, noting that "[s]aying... that [a] conclusion at least require[s] a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis."[268] Moreover, the Court acknowledged that:

> The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend

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ENT. L. REV. 583, 602 (2002).

261. Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 773 (8th Cir. 2004).

262. *Id.* (internal quotations omitted).

263. Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982).

264. Campbell, *supra* note 260, at 602.

265. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 763 (1999) (internal citations and quotations omitted).

266. 11 HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1911a (1st ed. 1998) (noting that the Supreme Court has "applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability").

267. *Id.* at ¶ 1911c.

268. *Cal. Dental Ass'n*, 526 U.S. at 779.

> to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified. [W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same - whether or not the challenged restraint enhances competition.[269]

Although the terms "per se," "quick look," and "rule of reason" are thus defined relative to one another, and there is "generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment," the three-tiered framework does provide a "'spectrum' of adequate reasonableness analysis for passing upon antitrust claims."[270] Along this continuum, courts evaluate "the circumstances, details, and logic of a restraint . . . to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a . . . [quicker] look, in place of a more sedulous one."[271]

The utility of this three-tiered framework as it might apply to the ADA's fundamental alteration query centers on the framework's use of unifying considerations to delineate gradations in the depth of the analysis that it will undertake and the breadth of factors that it will assess in the undertaking. Both the competitive significance query and the fundamental alteration query are best analyzed through a process that is transparent and not opaque. Indeed, "'[b]y exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future.'"[272]

C. Unifying Considerations for the Analysis

This Article posits that after the issues of deference and the scope of the remedy at issue are used by a court to define the contours of the fundamental alteration analysis, the ensuing analysis should consist of a close look at three defined considerations. Again, the factors discussed above should predicate the breadth and depth of the analysis as to each consideration with respect to the universe of things that may be considered and the extent to which the courts will delve into or question the way in which an entity chooses to define itself and its functioning. Through the

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269. *Id.* at 779–80 (internal quotations and citations omitted).

270. *Id.* at 780–81. "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for. . . . Nevertheless, the quality of proof required should vary with the circumstances." *Id.* at 780. (quoting 7 Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1507 (1st ed. 1986)).

271. *Id.* at 781.

272. *Id.* at 780 (quoting Areeda, *supra* note 270, ¶ 1500).

employment of these unifying considerations, courts will reach determinations that are more ideologically consistent with one another, irrespective of how divergent individual conclusions may seem.

1. The Legitimacy of the Stated Rationale or Purpose Behind the Defendant's Recitation of What Defines It and the Point at Which it is Fundamentally Altered

Most courts who have undertaken the fundamental alteration query have, on some level, assessed the rationale proffered by the defendant as to why it could not modify its policies or otherwise accommodate a disabled plaintiff. A court's explicitly addressing the defendant's purpose will ensure that the defendant's proffered objective is considered before the court summarily defines what it perceives to be the core of the entity's operation.

Based upon the relative level of deference accorded and the scope of the remedy below, a court may thus craft the parameters of its analysis in terms of its breadth, depth, and relevant universe of considerations. Thus, one analysis may accord strong presumptive deference to a defendant's stated purpose in refusing to make a modification or an accommodation based upon that defendant's identity or upon the court's perceived lack of competence in an arena. This court may then simply review the purpose to see if it masks an animus toward the disabled or if it is merely a pretext for an entity unwilling to make simple, reasonable, and appropriate changes. Another analysis may consist of a more searching look into a proffered rationale with more of a skeptical bent. The important thing is that all courts explicitly acknowledge and weigh the proffered purpose and that the ensuing analysis is contoured based upon the factors of deference and the scope of the remedy at issue.

So, for example, if the PGA in *Martin* had been asked to, as the Supreme Court posited hypothetically, enlarge the circumference of the golf holes in its tournaments, and it responded that the change "might alter such an essential aspect of the game of golf that it would be unacceptable,"[273] the relative obviousness of this to the court may make it such that a shallow analysis akin to the *per se* rule may apply. Just as the *per se* rule "identifies certain practices that completely lack redeeming competitive rationales," and is deemed "appropriate only for . . . conduct that would always or almost always tend to restrict competition and decrease output,"[274] so should a more shallow, deferential analysis apply when the defendant's identity or circumstances warrant one. However, just as in antitrust law, absent some compelling situation or consideration, like a proffered rationale that is facially illegitimate or patently pretextual, there should be an automatic

273. PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001).

274. Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1012 (6th Cir. 2005) (internal quotations and citations omitted).

presumption in favor of something akin to the rule of reason standard of analysis.[275]

2. The History and the Tradition of the Proposed Modification

The second consideration that a court should weigh formally in the course of the fundamental alteration query is the history and tradition of the proposed modification. Is the proposed modification one that has been made for this defendant previously? While not dispositive,[276] this very well may demonstrate that it will not fundamentally alter the defendant entity or its operations presently. Where, for example, a broader-based remedy is at issue, the scope of the query may expand, as discussed. Has the proposed modification been made by the defendant entity for other individuals? Has it been made in other contexts or was it made at other times? The analyses, like the factual backdrops of the cases, fall along a continuum; they range from those that factor in only the history and custom of the modification as it was effected between the plaintiff and the defendant entity to those that assess the modification as it has been made across time and across contexts.

3. The Impact of the Proposed Modification on Third Parties and on Society Generally

Finally, courts should explicitly contemplate the potential effect of the proposed modification on third parties and on society. Clearly, the ADA mandates that society must cede to the disabled certain resources typically reserved for the public on a "first come, first served" basis." This is evinced through the designation of disabled parking spots or disabled seating on a public bus. However, the situation becomes far more complex where, for example, a merit-based competition is implicated. Moreover, the potential lowering of academic or professional standards for one or more individuals may be seen as effecting an impermissible fundamental alteration because it compromises the experience or the competitive field for others enrolled in a program or practicing in a profession. A fundamental alteration may also impermissibly transform the nature of the services that a professional's students, clients, and patients can expect to receive. The reputation of an entire profession may hang in the balance, depending upon the remedy sought, if standards are relaxed.

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275. *See* Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726 (1988).

276. *See* Matthews v. NCAA, 179 F. Supp. 2d 1209, 1226 (E.D. Wash. 2001) (noting that it was "difficult, particularly in light of the individualized inquiry required by *Martin*, to see how granting a third waiver to Plaintiff would fundamentally alter the NCAA's purpose, when the first two waivers did not"). Such a scenario is truly a proverbial "double-edged sword," in that recognizing the viability of an accommodation extended in the past may advance the argument that no fundamental alteration could occur if it were extended again, but courts appearing to hold a past accommodation *against* an entity may deter potential defendants from affording accommodations. *See, e.g.*, Doe *ex rel.* Doe v. Haverford Sch., No. 03-3989, 2003 WL 22097782, at *27 (E.D. Pa. Aug. 5, 2003) ("Entities that make genuine efforts to integrate the disabled into society should not be subjected to liability when the entities provided more than the law required.").

Against the backdrop of any sort of merit-based competition, with an eye toward the specific type of competition being administered, courts can, and should explicitly address the societal impact and the impact upon third parties that a proposed modification can have.[277] Even if a mandated modification to the rules of a game or sport affects all players equally, for example, it may nonetheless render the game far less compelling for spectators to watch. The context presented by the facts of a case will guide courts as they distinguish between the province of cases in which something is to be ceded because meaningful access can only be arrived at by according some substance, and the province of cases involving competition or the lowering of standards. In the latter cases, the notion of a meritocracy undergirds society's conception of fairness and justice and a modification will likely not be permitted. In the antitrust context, the Supreme Court has stipulated that an alleged anticompetitive effect cannot be conjectural, hypothetical or presumed, and that a court must look to see "whether the effects actually are anticompetitive."[278] Similarly in the ADA context, a tangible adverse impact on the integrity of standards or competition should be demonstrated by a defendant alleging a fundamental alteration before a court accepts the defendant's point as to this consideration.

The ways in which this will be accomplished will vary, and clearly, it will not be sufficient for a court to say that because an athletic competition is at issue, any change of the rules will be impermissible. Indeed, scholars have already begun to parse out changes which will leave third parties and society none the worse off, and separate them from those which will strike at the integrity of the operation, service, or competition at issue: "[A]dding extra strikes for certain batters would change significantly what the pitcher has to

277. Stone, *supra* note 95, at 386 ("[T]he particular sport involved may dictate the availability of a reasonable accommodation. Speed events, such as track and swimming, may present certain challenges for finding reasonable accommodations that skill sports, such as golf, baseball, and football, may not."); *see also* Resslar, *supra* note 95, at 686 ("[N]ot all sports can reasonably accommodate a disabled athlete without fundamentally altering the game."); Walters & Chanti, *supra* note 85, at 752. Walters & Chanti propose the following considerations for cases in which an athlete seeks the change of a rule of competition:

(1) Is the rule set forth in writing as part of the primary rules of the game?

(2) Are exceptions to the rule allowed?

(3) Does the game exist to demonstrate a function?

(4) Are other ways to perform the function possible?

(5) Are other ways to perform the function permitted?

(6) Do athletes competing in that sport train for that function?

(7) Does the organization test for that function?

(8) Are points allocated for the function?

(9) What consequence does performance or non-performance of the function have?

(10) Can the purpose of the rule be met by performing the function in an alternative manner?

Id. at 752.

278. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775 n.12 (1999).

do and the game the fans watch. Allowing a college football player to take a higher percentage of his academic units in the summer affects neither the other players nor the fans."[279] "Instead of asking whether the modification would 'fundamentally alter' the sport," courts "ask whether it would significantly affect the experience of the sport for the other competitors and the fans."[280] Thus, societal impact and effect upon third parties should be one of several factors that courts weigh explicitly in the course of making a fundamental alteration determination.

CONCLUSION

In its brief to the Supreme Court, the PGA observed that the fundamental alteration inquiry—in its case, "whether a particular substantive rule is fundamental to a particular sport"—"is doomed from the outset by the lack of any coherent standard to guide it."[281] A survey of *Martin* and its progeny over the past five years demonstrates that courts performing fundamental alteration analyses have been operating without meaningful guidance in the form of a workable framework or a coherent standard. It is vital that society recognize the significance of the fundamental alteration defense and the way in which it is adjudicated, because its underlying mechanism reflects society's values on the core issues of the politics of accommodation and inclusion.

Forcing courts to acknowledge that they are endeavoring to conduct an inquiry whose frame of reference can vary considerably in breadth and depth, and to articulate the level of deference that they will accord various defendants in various contexts will help in the construction of a coherent standard—even if this standard is ultimately fluid in nature. It is difficult to say how Eddie Gaedel would fare in the court system under today's anti-discrimination laws, especially in light of the fact-intensive nature of the issue of who is considered disabled. It is, however, safe to say that Mr. Gaedel's professional baseball debut raised critical questions, relevant today, about those whose very inclusion in the system is seen as a threat to subvert it, and society's responsibility to ensure that issues of legal inclusion and impermissible alteration are decided within a framework that is organized and reliable and in the course of a process that is transparent and fair.

279. Greely, *supra* note 84, at 125.

280. *Id.*

281. Brief for Petitioner, *supra* note 65, at 36.

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